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In The

Supreme Court of the United States

October Term, 1996

DONALD LEE EARLES
and
CATHERINE PAPAJOHN,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Federal Rule of Evidence 804(b)(5), the residual hearsay exception, can be used to admit hearsay evidence in the form of grand jury testimony, which is contemplated by Federal Rule of Evidence 804(b)(1) and specifically disallowed by that Rule.

2. Whether the United States Court Appeals for the Eighth Circuit erred in finding that the alleged "particularized guarantees of trustworthiness" surrounding the hearsay statements in the case at bar were sufficient to overcome the mandate of the Confrontation Clause of the Sixth Amendment to the United States Constitution.

3. Whether the United States Court of Appeals for the Eighth Circuit erred in finding that the alleged "particularized guarantees of trustworthiness" surrounding the hearsay statements in the case at bar were sufficient to meet the standard for admissibility under Federal Rule of Evidence 804(b)(5).

4. Whether the United States Court of Appeals for the Eighth Circuit erred in finding that there was sufficient evidence to convict Petitioners.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION AND FEDERAL RULE OF EVIDENCE INVOLVED 2

STATEMENT OF THE CASE 3

ARGUMENT 7

CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES:

Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974) 9, 11

Idaho v. Wright, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990) 9, 11

McKethan v. United States, 439 U.S. 936, 99 S.Ct. 333, 58 L.Ed.2d 333 (1978) 8

United States v. Bailey, 581 F.2d 341 (3rd Cir. 1978) 7

United States v. Dent, 984 F.2d 1453 (7th Cir. 1993) 8

United States v. Salerno, 505 U.S. 317, 112 S.Ct. 2503, 120 L.Ed.2d 255 (1992) 8

United States v. Vigoa, 656 F.Supp. 1499 (D.N.J. 1987), *aff'd*, 857 F.2d 1467 (3rd Cir. 1988) 7, 8

STATUTES:

Title 18, United States Code, § 3231 6

Title 18, United States Code, § 3731 6

Title 28, United States Code, § 1254 2

OTHER:

Federal Rule of Evidence 804(b)(1) 7, 8

Federal Rule of Evidence 804(b)(5) 2, 7, 8, 9, 10, 11

Sixth Amendment to the United States Constitution 2, 9

TABLE OF AUTHORITIES – Continued

Page

Weissenberger, *The Admissibility of Grand Jury Transcripts; Avoiding the Constitutional Issue*, 59 Tulane L.Rev. 335 (1984) 8

Burstein, *Admission of an Unavailable Witness' Grand Jury Testimony: Can It Be Justified?*, 4 Cardozo L.Rev. 263 (1983) 8

PETITION FOR WRIT OF CERTIORARI

The Petitioners, Donald Lee Earles and Catherine Papajohn, respectfully pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on May 8, 1997 in Case No. 96-1246.

OPINIONS BELOW

On May 8, 1997 the Court of Appeals for the Eighth Circuit entered its Opinion, set forth in the Appendix at pages 25a through 37a, which reversed the District Court's ruling granting the defendants' motions for judgment of acquittal. Furthermore, the United States Court of Appeals for the Eighth Circuit issued an Order denying the Petitions for Rehearing and Suggestion for Rehearing En Banc on June 18, 1997, set forth in the Appendix at page 38a. The District Court's Order of December 29, 1995, which granted the defendants' motion for judgment of acquittal, is set forth in the Appendix at pages 1a through 24a.

JURISDICTION

On May 8, 1997 the Court of Appeals entered its Opinion reversing the ruling of the District Court on the Defendants' motions for judgment of acquittal. An Order Denying Petitions for Rehearing and Suggestion for Rehearing En Banc was filed June 18, 1997. Jurisdiction of

the Supreme Court is invoked under Title 28, United States Code, § 1254.

CONSTITUTIONAL PROVISION AND FEDERAL RULE OF EVIDENCE INVOLVED

Amendment 6, Constitution of the United States:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Federal Rule of Evidence 804(b)(5):

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the

adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare and meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

STATEMENT OF THE CASE

NATURE OF THE CASE

On October 24, 1991, Defendants Donald Lee Earles (hereinafter "Earles") and Catherine Papajohn (hereinafter "Papajohn") were indicted by a federal grand jury. Earles was charged with arson arising out of the destruction of the Countryside IGA grocery store in Sloan, Iowa, and Papajohn was charged with aiding and abetting Earles in the alleged arson. Furthermore, Earles and Papajohn were charged with mail fraud and conspiracy to commit arson and mail fraud.

Following the jury trial of Earles and Papajohn, the jury rendered its verdict on May 26, 1995: Earles was found guilty of arson, aiding and abetting mail fraud, and conspiracy to commit arson and mail fraud, and Papajohn was found guilty of aiding and abetting arson, mail fraud, and conspiracy to commit arson and mail fraud. Earles and Papajohn both filed post-trial motions for a judgment of acquittal and motions for a new trial.

On December 29, 1995, the District Court, Honorable Judge O'Brien, granted the motions for acquittal. The United States appealed the decision to the United States Court of Appeals for the Eighth Circuit. The Court of

Appeals reversed the judgment of acquittal and reinstated the jury's verdict on May 8, 1997. On June 18, 1997, the Court of Appeals denied the defendants' Petitions for Rehearing and Suggestion for Rehearing En Banc.

FACTS OF THE CASE

Papajohn owned and operated the Countryside IGA grocery store in Sloan, Iowa, which was destroyed by fire during the early morning hours of January 23, 1989. Earles and Papajohn were companions at the time and shared a residence. Earles' son, Donald Scott Earles (hereinafter "Donnie") also lived in Sloan at the time of the fire.

The fire was investigated by the Iowa State Fire Marshall. Deputy Fire Marshall Evilsizer initially determined that the fire was "suspicious", and during trial, Deputy Evilsizer testified that the cause of the fire was arson. Papajohn's insurance carrier, St. Paul Fire and Marine, also thoroughly investigated the fire and determined that the cause of the fire was arson, but determined that Papajohn had no motive or involvement in the fire, and willingly paid her insurance claim. Because she was underinsured, Papajohn did not receive the full value of the property from the insurance payment. Soon after the fire and before she received her insurance settlement, Papajohn hired an investigator, Adolf Wolf. Wolf advised Papajohn that the cause of the fire was an electrical problem, and that the fire was not of incendiary origin. Wolf restated his conclusions at trial.

The United States Attorney for the Northern District of Iowa investigated the fire as an arson. Along with

Papajohn and Earles, the government considered Donnie to be a suspect in the fire. During the investigation into the fire, the government was also pursuing unrelated fraud charges against Earles, Papajohn, and Donnie. In the unrelated fraud case, Earles was ultimately convicted and Papajohn was acquitted, and Donnie came to a plea agreement with the government on those fraud charges. At that time, the government threatened Donnie with criminal charges related to the fire, and was told that if he testified against his father and Papajohn with regard to the fire, he would not have to go to jail because of his plea of guilty in the fraud case and no charges would be brought against him arising out of the fire.

The government instituted grand jury proceedings against Earles and Papajohn. Donnie was brought in to testify before the grand jury for the first time on May 13, 1991. Donnie testified that he did not have personal knowledge of any involvement by Earles or Papajohn in the fire. After this testimony from Donnie, the government offered Donnie a second chance to testify, and he was given total immunity from prosecution – he was given both use immunity and immunity from perjury. On July 17, 1991, Donnie testified again before the grand jury and stated that his father had started the fire and that Papajohn was involved.

Papajohn and Earles were indicted later that year on October 24, 1991 with the aforementioned charges relating to the fire. In 1994, the government convened a grand jury to investigate potential witness tampering after they concluded that Donnie was not going to testify at trial against either Earles or Papajohn. Donnie was brought in to testify before that grand jury on April 5, 1994, and he

stated that he would not testify against Earles or Papajohn. Because there was no evidence whatsoever of witness tampering, no charges were brought.

Papajohn's and Earles' cases were severed by the District Court, and Papajohn went to trial in March, 1995. The government called Donnie to the stand, and he refused to testify, invoking his Fifth Amendment privilege. A mistrial was declared and the trials of Earles and Papajohn were reconsolidated and set for May, 1995. At the joint trial, Donnie was again called to the stand by the government. Donnie continued to refuse to testify and was found in contempt of court. Upon the government's request, the District Court allowed portions of Donnie's prior grand jury testimony to be read to the jury. After trial, the District Court ruled that the grand jury testimony should not have been admitted into evidence, and that without his testimony inculpating Earles and Papajohn, there was insufficient evidence to convict either defendant.

BASIS FOR JURISDICTION IN THE COURTS BELOW

The District Court had jurisdiction of the case pursuant to Title 18, United States Code Section 3231. The United States Court of Appeals for the Eighth Circuit had jurisdiction pursuant to Title 18, United States Code, Section 3731.

ARGUMENT

The decision of the United States Court of Appeals for the Eighth Circuit is in conflict with case law from other circuits on the issue of whether or not grand jury testimony, which is specifically disallowed by Federal Rule of Evidence 804(b)(1) because it is not subject to cross-examination, may be admitted under the residual hearsay exception, Rule 804(b)(5). This issue has not been addressed by this Court, and it would be appropriate for the Court at this time to address the issue and resolve the dispute so there is consistency throughout the nation on the interpretation of an important rule of evidence.

The Eighth Circuit's opinion notes that several other circuits have ruled that Rule 804(b)(5) may be used to admit hearsay which is specifically contemplated by other hearsay exceptions as long as the requisite guarantees of trustworthiness are present. [Appendix p. 31a]. The Third Circuit, however, has endorsed a more narrow application of Rule 804(b)(5). *See United States v. Bailey*, 581 F.2d 341 (3rd Cir. 1978). In *United States v. Vigoa*, 656 F.Supp. 1499 (D.N.J. 1987), *aff'd*, 857 F.2d 1467 (3rd Cir. 1988), the district court specifically addressed this issue and cited authority that the legislative history did not support the conclusion that the residual hearsay exception could be used to admit evidence which is covered by a specific exception and fails to meet the standards of the specific rule. *Id.* at 1504.

"[W]herever a potential use of hearsay was specifically contemplated and consciously rejected in the Rules' overall design, it would pervert Congress' plan if the residual exceptions were allowed to resurrect that

rejected class of hearsay and render it admissible in derogation of its intended exclusion elsewhere in the hearsay rules." *Vigoa*, 656 F.Supp. at 1505, (citing Weissenberger, *The Admissibility of Grand Jury Transcripts; Avoiding the Constitutional Issue*, 59 Tulane L.Rev. 335, 342 (1984); Burstein, *Admission of an Unavailable Witness' Grand Jury Testimony: Can It Be Justified?*, 4 Cardozo L.Rev. 263, 268 (1983)). It has been said that this Court's holding in *United States v. Salerno*, 505 U.S. 317, 112 S.Ct. 2503, 120 L.Ed.2d 255 (1992), requires a "fresh look at the introduction of grand jury testimony" under Rule 804(b)(5). *United States v. Dent*, 984 F.2d 1453, 1465 (7th Cir. 1993) (Easterbrook, J., concurring). In *Dent*, Judge Easterbrook concluded that Rule 804(b)(5) cannot be used to admit grand jury testimony. "Temptation to get 'round this limitation by moving to Rule 804(b)(5) and slighting its introductory language should be resisted." *Id.* at 1467.

The Eighth Circuit's ruling in the case at bar ignores the plain meaning to the introductory language of Rule 804(b)(5). Former testimony is "specifically covered" by Rule 804(b)(1), and thus, cannot be admitted under Rule 804(b)(5). In *McKethan v. United States*, 439 U.S. 936, 99 S.Ct. 333, 58 L.Ed.2d 333 (1978), this Court denied a petition for writ of certiorari which requested the Court to confront the same issue that is present in the case at bar. Justices Stewart and Marshall dissented from the denial, noting that the lower courts were "struggling with the problem of the admissibility of hearsay evidence not falling within one of the traditional exceptions to inadmissibility." *McKethan*, 99 S.Ct. at 335. Nearly twenty years later, the lower courts are still struggling with this issue. Petitioners Earles and Papajohn respectfully

request that this Court address this issue and find that Rule 804(b)(5) does not serve to admit evidence which is specifically contemplated by another hearsay exception and is not admissible under the specific hearsay exception.

If the Court concludes that Rule 804(b)(5) may be used to admit grand jury testimony, Petitioners submit that the alleged circumstantial guarantees of trustworthiness relied upon by the Eighth Circuit in determining that Donnie's grand jury testimony was admissible falls nowhere near the standards for admissibility under either Rule 804(b)(5) or the Confrontation Clause to the Sixth Amendment. Neither Earles or Papajohn were able to cross-examine Donnie, and his inculpatory grand jury testimony was the only testimony presented at trial linking either defendant to the alleged arson.

Under both Rule 804(b)(5) and the Confrontation Clause, the out-of-court statement must be so reliable that cross-examination would be superfluous. *Idaho v. Wright*, 497 U.S. 805, 820, 110 S.Ct. 3139, 3149, 111 L.Ed.2d 638 (1990). "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. . . . We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross examination." *Davis v. Alaska*, 415 U.S. 308, 316, 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347 (1974).

In the present case, Donnie's grand jury testimony was surrounded by a myriad of reasons as to why his testimony was inherently unreliable, and therefore inadmissible under the Confrontation Clause and Rule

804(b)(5). In holding that Donnie's grand jury testimony was reliable, the Eighth Circuit relied on the belief that Donnie would not testify against his father if it was not true and the fact that his grand jury testimony was under oath. When these assumptions are compared to the facts in the record, it is clear that the grand jury testimony was unreliable, and its admission violated Earles' and Papajohn's constitutional rights.

At trial, outside of the presence of the jury, Donnie testified that he was under intense pressure from the United States Attorney to testify falsely against Earles and Papajohn during his second grand jury testimony, the testimony which inculpated Earles and Papajohn. Also at trial, Donnie explained that he would not testify because the government would not grant him immunity from perjury as they had done before: The government boxed Donnie into his second grand jury testimony by giving him total use immunity and perjury immunity after his first grand jury testimony so he could change his story with impunity, but after his second grand jury testimony where he inculpated the defendants, the government refused to give him immunity from perjury again. Therefore, when Donnie did not testify the way the government wanted, they let him change his story without potential criminal consequences; no such offer of immunity was made to Donnie after they had him locked into his testimony against Papajohn.

Other indicae of unreliability are as follows: (1) Donnie testified that he could not stand Papajohn. Therefore, he had a clear motive to fabricate his testimony. (2) During Donnie's critical July 17, 1991 grand jury testimony, he stated that he had made up several stories regarding

the fire to protect himself. (3) Donnie was recently convicted of mail fraud and had been sentenced to fourteen months of imprisonment. (4) On the day which Donnie was to be sentenced for mail fraud (which was prior to his July 17, 1991 testimony), Donnie met with several government officials and was told that criminal charges were going to be brought against him in connection with the fire. Donnie was promised by the government that if he would testify against Earles and Papajohn, he would be immune from prosecution with regard to the fire and would not have to serve any jail time for the mail fraud conviction. (5) Donnie had a severe drinking problem at the time he testified against Papajohn, and he was a frequent drug user at that time. (6) Donnie was given a polygraph test wherein he was asked questions about the fire and his role in that fire. He failed the polygraph test and the results of the test indicated that Donnie was being deceptive about his own role in the fire.

Given the mountain of evidence showing the unreliability of Donnie's grand jury testimony, the standards for admissibility under Rule 804(b)(5) and the Confrontation Clause have been lowered to a constitutionally impermissible level after the Eighth Circuit's decision in the case at bar. Under the standards set forth in cases such as *Idaho v. Wright* and *Davis v. Alaska*, Donnie's grand jury testimony should never have been presented to the jury.

Without Donnie's grand jury testimony, there was insufficient evidence to convict either Earles or Papajohn. The District Court found that without Donnie's grand jury testimony, "a reasonably minded jury [would] have

[had] a reasonable doubt as to the existence of any essential elements of the crime charged." [Appendix p. 18a]. The Eighth Circuit's holding that there was sufficient evidence to convict Earles and Papajohn rested on the premise that Donnie's testimony was admissible. Because it was unconstitutional and in violation of the rules of evidence to admit the grand jury testimony, Donnie's testimony should not have been considered, and without that evidence, the convictions cannot stand.

CONCLUSION

For the foregoing reasons, the Petitioners pray that the writ of certiorari be granted.

Respectfully submitted,

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DATED: September 16, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	NO. CR 91-4016-DEO
vs.	)	
DONALD LEE EARLES and CATHERINE PAPAJOHN,	)	ORDER
Defendants.	)	(Filed December 29, 1995)

This matter comes before the Court on the defendant's joint motion for a new trial or, in the alternative, motion for judgment of acquittal. The issues were briefed and the matter is considered submitted. After careful consideration of the parties' arguments made during the trial and in post-trial briefs, the defendants' joint[1] motion for judgment of acquittal is granted and the motion for a new trial is denied.

I. FACTS

On October 24, 1991, a grand jury in the Northern District of Iowa returned an indictment charging defendant Earles with maliciously damaging and destroying

[1] The Court considers the defendants' separate motions for judgment of acquittal to be a "joint" request because both defendants strenuously argue that the grand jury testimony of Donald Scott Earles was improperly admitted and, for their reasons, they both assert the same type of arguments.

the Countryside IGA in Sloan, Iowa. The indictment further charged defendant Papajohn with aiding and abetting such damage and destruction. Counts 2 and 3 of the indictment charged both defendants with devising a scheme and artifice to defraud St. Paul Fire and Marine Insurance Company out of money. Count 4 alleged that defendants Earles and Papajohn laundered the proceeds received from the mail fraud. Count 5 of the indictment charged the defendants with conspiracy to commit an offense against the laws of the United States, i.e., mail fraud and money laundering. Finally, the indictment in Count 6 sought forfeiture of approximately $188,665.00 which was allegedly received as proceeds of the defendants' unlawful activities.

After numerous pre-trial motions, one of which granted severance of the trials, the trial of defendant Papajohn commenced on March 22, 1995. As its first witness, the Government called Donald Scott Earles, the son of defendant Donald Lee Earles, to the stand. After a few preliminary questions by the prosecutor, Donald Scott Earles refused to testify regarding his knowledge, if any, of the circumstances surrounding the damage and destruction of the Countryside IGA. After carefully considering the situation, the Court, upon the motion of the Government, granted Donald Scott Earles immunity. Nonetheless, the witness still refused to testify, all the time asserting his Fifth Amendment right against self-incrimination. At that time, the Court found Donald Scott Earles in civil contempt and sent him to jail until such time as he agreed to testify. Concluding that the trial could not go forward, this Court granted a continuance;

the jury was retained and told that they would be recalled.

On April 6, 1995, this Court entered an order directing that the trial of defendant Papajohn be restarted on May 1, 1995. The basis for this ruling was that sanctions for civil contempt are designed to be coercive in nature and therefore, the time spent in jail might coerce Donald Scott Earles into testifying. After two short status conferences, including one where the Government made a motion for a mistrial of the Papajohn trial, the Court, on May 1, 1995, held a hearing. At that hearing, the parties agreed that a mistrial would be appropriate and that a new jury would be empaneled for a trial with *both* defendants Earles and Papajohn. Recognizing that Donald Scott Earles might not testify at the joint trial, the Court ordered the parties to designate those portions of Donald Scott Earles grand jury testimony which they would want read to the jury if the witness refused to testify.

On May 4, 1995, defendant Papajohn filed an affidavit whereby she agreed to the mistrial and further agreed to be tried with her co-defendant, Donald Lee Earles. On the same day, the new jury was empaneled. As with the Papajohn trial, the Government called Donald Scott Earles as its first witness. Also, as he had done before, the witness refused to testify and was once again granted immunity. Donald Scott Earles, despite immunity, still refused to testify. The Court, at that time, did not again hold Donald Scott Earles in contempt as he was

at that time already in contempt and serving time in jail for refusing to testify at the first trial.[2]

After Donald Scott Earles again refused to testify, the Court reheard lengthy arguments on whether it was proper to have his grand jury testimony read in lieu of live testimony. The Court ruled, after carefully considering the matter over forty days (since it had come up during the first trial), that a reading of Donald Scott Earles' grand jury testimony was proper for three reasons: (1) the testimony was given under oath; (2) there was a substantial need for such testimony; and (3) that it is inconceivable that a son would falsely implicate his father and his father's co-habitant. The Court recognized at the time, and still recognizes, both defendant's position that Donald Scott Earles did not have complete immunity because he was not getting immunity for perjury if he committed perjury or what the Justice Department might consider to be perjury and follow that decision up by filing a perjury charge. The Court further recognized both defendant's argument that the introduction of such grand jury testimony violates their right to confront their accusers, guaranteed by the Sixth Amendment.

On May 26, 1995, after fourteen days of trial, the jury convicted defendant Earles (1) of maliciously damaging and destroying the Countryside IGA in Sloan, Iowa; (2) of aiding and abetting the crime of mail fraud for both Counts 2 and 3; and (3) of conspiring to maliciously

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[2] After the second trial, the Court gave Donald Scott Earles and additional 56 days contempt sentence which he served, which made his total incarcerated time for contempt approximately 140 days.

damage and destroy the Countryside IGA and to commit mail fraud. Donald Lee Earles was found not guilty in Counts 2 and 3 of the substantive crime of mail fraud. The jury also convicted defendant Papajohn of (1) aiding and abetting the malicious damage and destruction of the Countryside IGA; (2) of mail fraud for both Counts 2 and 3; and (3) of conspiring to maliciously damage and destroy the Countryside IGA and to commit mail fraud. The defendants promptly filed motions for a new trial and/or motions for judgment of acquittal.

II. DISCUSSION

Jointly, the defendant's main contention is that the introduction of the grand jury testimony of Donald Scott Earles was in violation of both the Federal Rules of Evidence and the Sixth Amendment to the United States Constitution. The Government argues that the admission of such evidence was proper because first it has a "circumstantial guarantee of trustworthiness," *Idaho v. Wright*, ___ U.S. ___, 110 S.Ct. 3139, 3149 (1990), which, according to the Government, meets the test for both the Federal evidentiary rules and for the Sixth Amendment. Secondly, the Government maintains that the admission of the grand jury testimony was proper and that it served the interests of justice because, otherwise, the Government would have no other witness who could testify to the direct involvement of the defendants in this alleged crime. The Court agrees that the same result, i.e., a finding by the Court that the grand jury testimony was reliable and/or trustworthy, suffices for purposes of the Federal Rules of Evidence and the Confrontation Clause.

United States v. Lang, 904 F.2d 618, 625 (11th Cir. 1990); *Wright, supra*, at 3149.

Because Donald Scott Earles was the Government's witness at trial, it was the Government's burden to get his testimony, either live or otherwise, in. As it became obvious that, despite sanctions of being in jail, Donald Scott Earles would not testify live, the Government relied upon two provisions of the Federal Rules of Evidence, Rule 804(b)(1) and 804(b)(5). First, Rule 804(b)(1) provides:

> The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> (1) Former Testimony – Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

In response to the Government's proffer, the defendants, because they were the ones against whom the evidence was to be admitted, pointed out that they never had "an opportunity . . . to develop the [grand jury] testimony by . . . cross . . . examination." FED. R. EVID. 804(b)(1).

Initially, in order for any evidence to come in under any of the exceptions listed in Rule 804, there must be a showing of unavailability, which includes a declarant who "persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the

court to do so." FED. R. EVID. 804(a)(2). Although the defendants appear to disagree,[3] this Court finds that Donald Scott Earles was "unavailable" because he refused to testify at trial without a legitimate reason, despite the fact that he was jailed for contempt.

With respect to the other issue in a 804(b)(1) analysis – whether the party against whom the evidence is offered had an opportunity to develop the testimony by cross-examination – the Court considered those arguments at the time and ruled that the defendants were correct in that, at the grand jury proceeding, neither their lawyer nor their lawyer's predecessor were present and, thus, no one on their behalf could have cross-examined Donald Scott Earles on any of the three occasions he appeared before the grand jury. The Court has reconsidered this ruling and affirms its earlier decision. *See DeLuryea v. Winthrop Laboratories*, 697 F.2d 222, 227 (8th Cir. 1983) (opportunity to cross-examine is the important factor in a 804(b)(1) analysis); *Pearl v. Keystone Consol. Indus., Inc.*, 884 F.2d 1047 (7th Cir. 1989). Therefore, the testimony did not and should not have come in under 804(b)(1).

As an alternative position, the Government relied upon 804(b)(5), which provides:

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[3] As mentioned earlier, the reason the defendants disagree is because they contend that Donald Scott Earles *did* have a Fifth Amendment interest in not testifying – namely, the threat of a prosecution for perjury. The Court, as it did at the time of trial, rejects that contention for the same reasons it did at trial. To give him immunity for perjury would give him a free ticket to say anything that came into his head without any fear of repercussions.

> The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> (5) Other exceptions – A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

FED. R. EVID. 804(b)(5).

At the time of trial, the Court and parties overlooked the introductory language of this rule, which states: "A statement not specifically covered by any of the foregoing exceptions. . . . " Accordingly, the Court at the time of trial immediately proceeded to the question of whether the statements made by Donald Scott Earles had the requisite "guarantees of trustworthiness." A review of the case law, however, suggests that the introductory words should not be so easily overlooked. For example, in *United States v. Vigoa*, 656 F.Supp. 1499 (D.N.J. 1987), *aff'd*,

857 F.2d. 1467 (3rd Cir. 1988), the district court judge concluded that

> in order to establish the applicability of Rule 804(b)(5), courts must first determine whether the proffered hearsay is of a type already 'covered' or contemplated by the specific exceptions. Where the proffered evidence is covered by a specific hearsay exception, it cannot qualify for admission under the residual exception but must be admissible, if at all, in accordance with the conditions of the specific exception.

Id. at 1504. The district court in *Vigoa* further determined that grand jury testimony is "former testimony" as contemplated by 804(b)(1) and, therefore, the only way grand jury testimony could ever be admitted is via 804(b)(1). *Id.* Having made those conclusions, the *Vigoa* court proceeded to determine whether the grand jury testimony could be admitted under the "former testimony" exception to the hearsay rule, codified at 804(b)(1). Eventually determining that it could not, the *Vigoa* court opined that "fairness considerations require the exclusion of grand jury testimony against a defendant who had no opportunity to participate in the development of that evidence; particularly where . . . the proffered testimony is the most probative piece of incriminatory evidence." *Id.* at 1505.

Another case illustrative of the "specifically covered" distinction is *United States v. Dent*, 984 F.2d 1453 (7th Cir. 1993). In *Dent*, the court was confronted with a situation where a car salesman testified against the defendants before the grand jury but, at the time of trial, was in a foreign country and was unavailable. *Id.* at 1462. The Government sought to introduce the salesman's grand

jury testimony in lieu of the live testimony, to which the defendant's strenuously objected. *Id.* In the plurality opinion, the court stated the Supreme Court has not definitively ruled on whether grand jury testimony can be admitted under 804(b)(5) and acknowledged that "[t]here is a conflict among the circuits as to whether this evidence is admissible." *Id.* at 1463. The Seventh Circuit, however, did not reach that question and concluded that the admission of such evidence was harmless error. *Id.* at 1463.

In a concurrence, Judge Easterbrook and Chief Judge Bauer initially note that the recent United States Supreme Court decision of *United States v. Salerno*, ___ U.S. ___, 112 S.Ct. 2503, 120 L.Ed.2d 255 (1992), mandates that courts take a "fresh look" at the introduction of grand jury testimony under the catch-all exception to the evidentiary rules. *Dent*, 984 F.2d at 1465 (Easterbrook, J., concurring). Judge Easterbrook's principal disagreement with the introduction of that type of evidence under 804(b)(5) is that the language of that section specifically states that only "[a] statement not specifically covered by any of the foregoing exceptions. . . . " will be allowed in under 804(b)(5) and that grand jury testimony, as declared by *Salerno*, is "former testimony" which is covered by 804(b)(1). *Id.* at 1466. Thus, according to Judge Easterbrook and Chief Judge Bauer, grand jury testimony can only be admitted pursuant to 804(b)(1).[4] *Id.*

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[4] Even the plurality admitted that "[i]t would appear that the time is coming for us to reconsider this issue. . . . " *Dent*, 984 F.2d at 1465 n.1.

The Court recognizes that the above-stated conclusions are opposite of other conclusions reached by the other courts, for example, the Fourth Circuit and the Eleventh Circuit. In *United States v. Clarke*, 2 F.3d 81 (4th Cir. 1993), the court stated that the introductory language of 804(b)(5) means that a statement must meet all of the requirements for admissibility under one of the exceptions before it is "specifically covered." *Id.* at 83. According to the *Clarke* court, any other reading would "deprive the jury of probative evidence relevant to the jury's truth-seeking role." *Id.* In *United States v. Deeb*, 13 F.3d 1532 (11th Cir. 1994), the Eleventh Circuit relied on an earlier decision of that court to reject the conclusions outlined above and stated that a "contrary reading would create an arbitrary distinction between hearsay statements that narrowly, but conclusively, fail to satisfy one of the formal exceptions, but conclusively, fail to satisfy one of the formal exceptions, and those hearsay statements which do not even arguably fit into a recognized mold." *Id.* at 1536-37 (quoting *United States v. Fernandez*, 892 F.2d 976, 981 (11th Cir. 1990)).

Having carefully considered the statements from the *Vigoa* court and the statements of Judge Easterbrook and Chief Judge Bauer in *Dent* and the contrary holdings in *Clarke* and *Deeb*, this Court is persuaded that *Salerno* does hold that grand jury testimony, if admitted, must be admitted pursuant to the requirements of 804(b)(1). As such, the admissibility of grand jury testimony is "specifically covered" by one of the exceptions to the hearsay rule and, thus, the catch-all provision, 804(b)(5) cannot be used as a vehicle for the admission of uncross-examined grand jury testimony. The rationale of *Clarke* fails in part

due to the fact that the "jury's truth-seeking role," *Clarke, supra,* at 83, is not the only thing that must be taken into account in making evidentiary rulings – namely, the equally important rights of the accused to confront his/her witnesses. Moreover, truth cannot be necessarily equated with uncross-examined evidence. Secondly, the *Deeb* court's characterization of the distinction being "arbitrary," in this court's view, is inaccurate; rather, the distinction, although it may be fine, serves the very legitimate goal of protecting a defendant's right to cross-examine his/her witnesses.

Assuming, however, that this Court is incorrect in its assessment of the purposes and intent of the Federal Rules of Evidence, the defendant's second argument is that the admission of grand jury testimony, although it may be admissible under the Rules, is still in violation of the Sixth Amendment, which provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . . "

Under *Ohio v. Roberts,* 448 U.S. 56 (1980), a hearsay statement of an unavailable declarant, in order to satisfy the Confrontation Clause

> is admissible only if it bears adequate 'indicia of reliability.' Reliability can be inferred without more in a case where the evidence falls within a firmly rooted exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.

Id. at 66. When an individual's statements do not fall within a firmly-rooted exception to the hearsay rule, the statements are considered "presumptively unreliable and

inadmissible for Confrontation Clause purposes. *Lee v. Illinois*, 476 U.S. 530, 543 (1986).

Courts, when considering whether a statement has the required "particularized guarantees of trustworthiness," should look at "the relevant circumstances . . . that surround the making of the statement and that render the declarant particularly worthy of belief." *Idaho v. Wright*, 497 U.S. 805, 819 (1990). In other words, if such truthfulness is abundantly obvious after looking at such circumstances and a court is persuaded that cross-examination "would be of marginal utility," *Id.* at 819, then the admission of such testimony would not violate the Confrontation Clause. Under any scenario, corroborating evidence cannot be used to establish the trustworthiness of a statement. *Id.* at 822.

At the time of trial, as mentioned, this Court specifically considered the application of *Wright* to this case and reasoned that the testimony should be admitted because (1) the testimony was desperately needed by the Government; (2) the Court believed it would be more prudent, for purposes of making a satisfactory record for appellate review, to allow the testimony in in lieu of dismissing the case; (3) it was highly unlikely that a son would incriminate a father in such fashion unless the facts testified to were true; and (4) the testimony was given under oath. These were close tough calls. The Court specifically on three or four occasions told the parties that, if I do allow his grand jury testimony to be read and the defendants are convicted, I may well reconsider and throw the case out.

The Court has now reconsidered these reasons and tough issues and, having again reviewed the applicable law, is persuaded that the introduction of Donald Scott Earles" grand jury testimony violated the defendants' confrontation rights guaranteed by the Sixth Amendment. One of the factors that now is persuasive is that the Court's factual basis for allowing the evidence in – that it was unlikely that a son would tell lies about his father – has been rejected as sufficient evidence of trustworthiness by a case that was not brought to our attention during the trial but one that our research has since uncovered. In *United States v. Lang*, 904 F.2d 618, 623 (11th Cir. 1990), the Eleventh Circuit, in concluding that certain grand jury testimony was improperly admitted, stated:

> The government argues that the testimony exhibits circumstantial guarantees of trustworthiness because of Gerald Lang's relationship to the [defendant] and the fact that Gerald Lang testified to matters of first-hand knowledge. The government also stresses that Gerald was apprised of the fact that he was not a target of the investigation. We do not find that these factors significantly increase the trustworthiness of Gerald's grand jury testimony. Family members are no more likely than anyone else to testify truthfully about their activities or those of their relations. Indeed, there is a strong possibility that the rivalries and loyalties inherent in all families may color a family member's testimony. Given this possibility, it is particularly important that the jurors be afforded the opportunity to observe the family member making the statement and that the adverse party be afforded the opportunity to demonstrate a family member's bias.

Id. Therefore, this Court's strong reliance on such a factor was misplaced or at least not fully considered in light of *Lang*. This Court, in examining all the circumstances surrounding Donald Scott Earles' grand jury testimony, is unable to conclude that cross-examination of him would be of "marginal utility." *Wright*, 497 U.S. at 819.

This Court recognizes that the Eighth Circuit in *United States v. Carlson*, 547 F.2d 1346 (8th Cir. 1976) approved of the admission of grand jury testimony under 804(b)(5). In *Carlson*, the Court determined that the testimony of Tindall at the grand jury was trustworthy and reliable because it was given under oath, was based on first-hand knowledge, and was never recanted. *Id.* at 1354. To that extent, this Court is in conflict with *Carlson*. The facts of this case show that Donald Scott Earles testified three times in front of the jury. A fair statement of Donald Scott Earles' testimony is that on the first occasion, he stated that he did not much about the fire but that he would not put it past his father and Ms. Papajohn to do such a thing. On the second occasion, Donald Scott Earles gave testimony which tended to incriminate the defendants. In the last grand jury, Donald Scott Earles essentially refused to say anything about the fire and who might be responsible for it. Thus, it cannot be said that Donald Scott Earles *never* recanted his testimony. This, alone, distinguishes *Carlson*. In addition, this Court is persuaded that the law surrounding this issue has been more fully developed since 1976, when *Carlson* was handed down and this Court is persuaded that under the facts here, it is not inappropriate to find that *Carlson* is distinguishable.

Finally, this Court's conclusion that the grand jury testimony was improperly admitted is reinforced by Judge Easterbrook and Chief Judge Bauer's concurrence in *Dent, supra,* where they observed:

> Trial by affidavit was the bugbear that led to the confrontation clause; trial by grand jury testimony is not far removed. Grand jury testimony, like affidavit, is one-sided, an *ex parte* narration over which the prosecutor has ample control. To avoid the introduction of unilateral narrations, Rule 804(b)(1) provides that prior testimony is admissible only if the party against whom the evidence is offered had both opportunity to examine the declarant and motive to do so. That the testimony has indicia of trustworthiness cannot be controlling; many affidavits *appear* to be trustworthy. A defendant's entitlement to confront the witnesses against him is not limited to confronting apparently-untrustworthy witnesses. Confrontation is valuable in large measure because it may establish that what seems to be accurate is misleading or deceitful or rests on inadequate foundation. Conditions on the use of Rule 804(b)(1) ensure that the defendant retains the right of confrontation in circumstances that lie at the core of the constitutional guarantee. Temptation to get 'round this limitation by moving to Rule 804(b)(5) and slighting its introductory language should be resisted.

Dent, 984 F.2d at 1466-67 (Easterbrook and Bauer, JJ., concurring). This Court had, during the trial, agonized over "][t]he fact that [the right to confront] appears in the Sixth Amendment of our Bill of Rights reflects the belief of the Framers . . . that confrontation was a fundamental right essential to a fair trial in a criminal prosecution."

Pointer v. Texas, 380 U.S. 400, 404 (1965). The conclusion this court now reaches is simple: When the absence of cross-examination leaves doubt as to the reliability and trustworthiness of the statements given in a grand jury proceeding, the defendant's right to confront his/her witnesses must be safeguarded. The fact

> that the evidence was first given before a grand jury ads little to its reliability. In grand jury proceedings, the ordinary rules of evidence do not apply. Leading questions and multiple hearsay are permitted and common. Grand jury investigations are not adversary proceedings. No one is present to cross-examine the witnesses, to give the defendant's version of the story, or to expose weaknesses in the witnesses' testimony.

Garner v. United States, 439 U.S. 936, 938 (1978) (Stewart and Marshall, JJ., dissenting). In addition, it is well-settled that the mere fact that the testimony is made under oath is not enough to guarantee its "trustworthiness." *United States v. Deeb*, 13 F.3d 1532, 1538 (11th Cir. 1994) (citing *United States v. Lang*, 904 F.2d 618, 623 (11th Cir. 1990)). This Court knew and considered all these factors during the trial. The only difference now is that the Court is persuaded that the close tough calls should go the other way.

Having concluded that the grand jury testimony was inadmissible, the Court then is left with the issue of whether the motion for judgment of acquittal should be granted. In other words, the issue is whether the Government's evidence, without the grand jury testimony of

Donald Scott Earles, is sufficient to convict the defendants. In referring to Rule 29, the Eighth Circuit has stated:

> The correct test to apply in the determination of a motion for judgment of acquittal is: 'A motion for judgment of acquittal should only be granted where the evidence viewed in the light most favorable to the government, is such that a reasonably minded jury *must* have a reasonable doubt as to the existence of any essential elements of the crime charged.' In other words, the test is whether a 'reasonable fact finder could have found guilt beyond a reasonable doubt.' Under this standard, the district court has 'very limited latitude. In deciding a motion for judgment of acquittal, the court can neither weigh the evidence nor assess the credibility of the witnesses.'

United States v. Pardue, 983 F.2d 843, 847 (8th Cir. 1993) (citations omitted); *see also United States v. Robbins*, 21 F.3d 297, 298-99 (8th Cir. 1994). Thus, this Court is restricted to the evidence adduced at trial viewed in a light most favorable to the Government. Under the standard, even if this Court might think that one witness may be a particularly bad witness, the Court cannot weigh that evidence nor assess the credibility of that witness.

Viewing the evidence in a light most favorable to the Government, as this Court is required to do, the Court is persuaded that insufficient evidence exists to support *any* of the convictions. Without Donald Scott Earles; grand jury testimony, "a reasonably minded jury [would] have [had] a reasonable doubt as to the existence of any essential elements of the crime charged." His testimony was

the *only* evidence which tied defendant Papajohn to any of the crimes (the Government even so conceded this fact to the Court during argument on the admissibility of the grand jury testimony). The Court disagrees with the Government that Ms. Papajohn's statements in regard to the lighter fluid is sufficient to find her guilty of the crimes which she was convicted of. Furthermore, the Court disagrees with the Government's arguments regarding the evidence as it pertains to Donald Lee Earles. The grand jury testimony of Donald Scott Earles was the majority of the evidence which conclusively tied Donald Lee Earles to the alleged criminal activities. Without such evidence, any reasonable juror would have had a reasonable doubt as to Donald Lee Earles' guilt.

The Court recognizes that is now changing its position on a tough legal call. It warned the parties that it might well do this. It has now done so. The Court makes no apologies. *See United States v. King*, 713 F.2d 627 (11th Cir. 1987) (where Government would have no case at all without such evidence, but course is to admit the evidence.) This Court did that instead of dismissing the case. For all the reasons set out above, it is now reversing itself.

The Court recognizes that the defendants have also filed separate motions for a new trial asserting various grounds.[5] Defendant Papajohn and defendant Earles both

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[5] Since the judgment of acquittal has been granted, the defendants are probably not interested in a new trial. Neither is the Court because it is persuaded that Donald Scott Earles is very unlikely to ever testify live and we would be faced with the same tough problems. However, to complete the record, the Court will address the motion.

argue that the Court unfairly refused to allow her to introduce the live testimony of Donald Scott Earles wherein he stated that the prosecutor, Michael Hobart, had forced him into testifying the way he did at the grand jury. The Court relies upon the record made at the time of trial in denying the motion for a new trial on this ground, especially the record made by the Court which explained the confusion and potential for a mistrial if this Court allowed Donald Scott Earles to testify live in favor of the defendants yet still refusing to testify about the things he testified to in the grand jury. In any event, the Court is confident that the substantial rights of the defendants were not impaired by the refusal of the Court to allow such live testimony. Further, there is nothing in the record which reveals that Donald Scott Earles would have really testified about this if he had been called by the defendants.

Secondly, both defendants desire a new trial on the basis that the Court somehow assisted the prosecution in its rebuttal closing argument. The Court has considered this argument and is persuaded that any "assistance" which might have been given was done only for the purpose of outlining the parameters which the prosecutor could discuss in his rebuttal closing argument and not for the purpose of actively helping the prosecutor make his final argument.

For example, the prosecutor, in response to a comment from Papajohn's counsel during closing as to why the prosecutor did not read the plea agreement of Donald Scott Earles, wanted to read to the jury in his rebuttal the whole plea agreement of Donald Scott Earles or, in the alternative, tell the jury that the law would not allow him

to read it. The Court, in ruling on this argument, refused to let the prosecutor read the plea agreement and similarly refused to let the prosecutor tell the jury what the law was, as this was the province of the Court not the prosecutor. Therefore, as a solution to the problem, the Court informed the prosecutor that he could state, in response to the argument made by Ms. Papajohn's counsel, that the Court would not allow him to read the plea agreement.

The Court reminds the parties that the defendants, because of their closing arguments, put the Court in a position which necessitated the discussion which the defendants claim was "assistance." In other words, the Court was making every attempt to avoid a mistrial and believed it could best do so by having a discussion as to what the prosecutor could discuss and what he could not discuss. As with the earlier argument, the Court is persuaded that the substantial rights of the defendants were not impaired by this Court's conduct.

Both defendants also ask for a new trial based on other alleged misconduct made by Government counsel during the closing argument, which includes *inter alia* a claim that the prosecutor "testified" during closing argument, a claim that the prosecutor personally attacked defense counsel during his closing argument, and a claim that the prosecutor made false and misleading statements to the jury during his closing argument. The Court has considered the legal arguments of both parties and is persuaded that any errors made by the prosecutor during the closing argument were not sufficiently prejudicial so as to warrant a new trial. The Court does not have perfect recall of the closing arguments but is confident that the

legal arguments advanced by the defendants are primarily based on the rulings made by the Court prior to the rebuttal argument as discussed above. These were rulings by the Court to allow the Government to respond to statements which the Government argued were "way out of line" and the Court found the Government's arguments had merit.

Defendant Papajohn and defendant Earles also seek a new trial on the basis that intentional prosecutorial misconduct occurred, i.e., an assistant reading the grand jury testimony "slow", the prosecutor referring in an examination of a witness to the fact that defense counsel was suing a local catholic hospital, and the introduction into evidence the fact that Donald Lee Earles had previously filed bankruptcy. Having reviewed the arguments of the defendants, the Court is persuaded that the defendants have failed to meet their burden of showing intentional misconduct. The Court simply is not able to conclude as a matter of law that either the prosecutor or one of his assistants, while reading testimony, purposely attempted to prejudice the rights of the defendants by over-emphasizing by reading slowly. Rather, the Court is inclined to believe that most, if not all of the alleged misconduct, was committed inadvertently. In any event, any error that may have been committed did not sufficiently prejudice the defendants so as to warrant a new trial.

Defendant Papajohn also seeks a new trial on the ground that he was unable to obtain Fire Marshal Evilsizer's actual notes, which are a court exhibit and sealed as part of this record. The Court, at the time, reviewed the notes *in camera* and held a lengthy hearing making substantial record to support the Court's refusal to turn

over all of the notes to the defendants. The Court relies on this record and denies the motion for a new trial based on that claim.

In addition to defendant Papajohn's arguments, defendant Earles also argues that the Court erred when it allowed the Government to read into evidence portions of the grand jury testimony of Donald Scott Earles dealing with the plea bargain and/or immunity that Donald Scott Earles had with the Government. In light of the fact that today this Court has ruled that the Donald Scott Earles grand jury testimony should not have been read, this issue is denied as moot.

Separate from the motion for a new trial, defendant Papajohn has moved to reopen her previously filed motion to suppress all the evidence obtained by the insurance investigators on the basis that the insurance investigator was an arm of the State at the time he was doing his investigation and, therefore, he needed a judicially-issued search warrant which he did not have. Ms. Papajohn asks that the Court allow additional "new" evidence to be admitted to support that motion. The Court has considered this motion and is persuaded that it should be denied. Any "new" evidence would require the Court to hear and judge it which would delay an appeal and/or finalization of this cause of action. The motion to suppress again is denied. The fact remains that the statutes of Iowa provide for the sharing of information and, thus, the insurance agent, by utilizing the statute, does not thereby become an agent of the State of Iowa, requiring him to have a judge-issued search warrant before he can enter and remain on the premises.

Also separate from the motion for a new trial is defendant Earles' motion for judgment of acquittal on the basis

that he was not brought to trial within the time required by the Speedy Trial Act. The Court relies on its earlier order dated August 2, 1994, wherein the Court determined that only a fraction of the Speedy Trial days had been used. As the parties know, the circumstances of this trial were that the Court granted the Government's motion to sever the defendants and the Government chose to try defendant Papajohn first. Donald Scott Earles was told that he could not be tried until the Papajohn trial was over. The parties also know that Ms. Papajohn's first trial ended in a mistrial and defendant Earles agreed that the defendants should be tried together. That trial commenced shortly thereafter. Defendant Earles was brought to trial within the mandates of the Speedy Trial Act.

Upon the foregoing,

IT IS HEREBY ORDERED that the defendants' joint motion for judgment of acquittal is granted.

IT IS FURTHER ORDERED that the defendants' separate motions for a new trial are denied.

IT IS FURTHER ORDERED that all other pending motions, except the motion to recuse filed by the defendants which will be dealt with in a separate order, which have yet to be ruled on, are denied as moot.

Dated this 29 day of December, 1995.

/s/ Donald E. O'Brien
Donald E. O'Brien,
Senior Judge
UNITED STATES
DISTRICT COURT

United States Court of Appeals
for the eighth circuit

No. 96-1246

United States of America, Appellant, v. Donald Lee Earles and Catherine Papajohn, Appellees.	* * * * * * * *	Appeal from the United States District Court for the Northern District of Iowa.

Submitted: January 16, 1997

Filed: May 8, 1997

Before RICHARD S. ARNOLD, Chief Judge, ROSS, and BEAM, Circuit Judges.

BEAM, Circuit Judge.

The government appeals the district court's judgment of acquittal in favor of defendants Donald Lee Earles and Catherine Papajohn. We reverse.

I. BACKGROUND

On October 24, 1991, a grand jury indicted Donald Lee Earles (Earles) and Catherine Papajohn (Papajohn) for their roles in the burning of the Countryside IGA in Sloan, Iowa. Count One of the indictment charged Earles with maliciously damaging and destroying the grocery

store and Papajohn with aiding and abetting that destruction. The indictment further charged Earles and Papajohn with: (1) devising a scheme to defraud St. Paul Fire and Marine Insurance Company (St. Paul) (Counts Two and Three); (2) laundering the proceeds received from the mail fraud (Count Four); and (3) conspiring to commit an offense against the laws of the United States, i.e., mail fraud and money laundering (Count Five). The indictment also sought the forfeiture of approximately $188,665.00, the amount received as proceeds of the defendants' allegedly unlawful activities.

Prior to the indictment, Earles's son Donald Scott Earles(Donnie) testified before the grand jury three times.[1] During Donnie's first grand jury appearance, he stated that he did not know who burned the Countryside IGA, but that he would not put it past his father and Papajohn to do such a thing. At his second grand jury appearance, Donnie admitted to knowing more facts about the burning of the IGA and testified to those facts in great detail. At his third appearance, Donnie stated that he would not comment further on the fire or testify against his father or Papajohn, his father's girlfriend.

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[1] Earles, Papajohn, Donnie and another individual had previously been the subject of an investigation into a mail fraud scheme in which they allegedly sold non-existent propane tanks, bailing wire and twine to farmers. United States v. Earles, 955 F.2d 1175 (8th Cir. 1992). Trial of that matter resulted in Earles's conviction and Papajohn's acquittal. Id. at 1177. In exchange for being permitted to enter a guilty plea to conspiracy to commit mail fraud, Donnie agreed to cooperate with the government in several matters under investigation, including the burning of the IGA. Donnie's grand jury appearances were pursuant to that plea agreement.

The testimony Donnie gave during his second grand jury appearance can be summarized as follows. Earles told Donnie on the day of the fire that he planned to burn the IGA, had unsuccessfully attempted to do so the night before, and would try again that night. Earles explained that he and Papajohn had stockpiled lighter fluid in the store in preparation for the fire. On the night of the fire, Donnie was very nervous for his father and hung around the store until his father made him leave. After leaving the store, Donnie parked his car at Papajohn's residence and walked back to the IGA. At one point in the evening, Donnie remembers waving to a local police officer who was patrolling the area. Earles told Donnie that he and Papajohn wanted to be rid of the IGA and needed the money from the insurance to pay off their debts and start over again. After the fire, Earles told Donnie that he had barely been able to get out of the store because the lighter fluid ignited so quickly.

Earles and Papajohn filed numerous pretrial motions. The district court granted Papajohn's motion for severance and her case proceeded to trial. At that trial. Donnie refused to testify and stated that he was asserting his privilege against self-incrimination. Despite the government's grant of use immunity for his testimony and the district court's explanation that such immunity rendered his claim of Fifth Amendment immunity unavailing, Donnie continued to refuse to testify at trial, explaining that he did not want to testify against his father or Papajohn. The district court held Donnie in contempt and jailed him for his failure to testify. After granting a continuance, the district court explained that a mistrial would be granted

if Papajohn agreed to be tried together with Earles. Papajohn agreed and the district court declared a mistrial.

At the subsequent joint trial of Earles and Papajohn, Donnie again refused to testify, in spite of the intervening jail time and another grant of immunity. The district court declared Donnie an unavailable witness and allowed the government to read to the jury redacted portions from all three of the transcripts of Donnie's grand jury testimony, over defendants' objection.

In addition to Donnie's testimony, a local deputy sheriff testified that he had observed Earles and Donnie entering and exiting the IGA and a nearby building around 1:00 a.m. on the night of the fire. Because the officer was suspicious of the late night activity, he drove by the store again later that night. At that time, he followed the men's vehicle to Papajohn's residence where they entered through the garage. Still later that same morning, the officer received the call regarding the fire at the IGA.

The government also presented evidence that the fire investigators had concluded that arson was the cause of the fire. The investigators agreed that the fire was incendiary in origin and that a flammable liquid had been used as an accelerant. In addition, the government presented evidence that Papajohn had been experiencing financial difficulty and was behind in her payments to creditors and vendors, including six months behind in payments on a secured note for the IGA inventory. Further evidence showed that Papajohn processed her proof of loss with St. Paul through the mail. Papajohn, in return, was sent

checks from St. Paul totaling $188,665.00 in settlement of her claim.

The jury convicted Earles of one count of arson, two counts of aiding and abetting the crime of mail fraud, and one count of conspiracy. Papajohn was convicted of one count of aiding and abetting arson, two counts of mail fraud, and one count of conspiracy. After trial, defendants moved for a judgment of acquittal or, in the alternative, a new trial. They contended that the district court erred in allowing Donnie's grand jury testimony into evidence and that the government's evidence, without the grand jury testimony, was insufficient to support the convictions. The district court agreed and entered a judgment of acquittal. It denied defendants' alternative motions for a new trial. The government appeals, arguing that the grand jury testimony was properly admitted and, if not, that the defendants should be retried.

II. DISCUSSION

A. Admission of Grand Jury Testimony

As indicated, after Donnie refused to testify, the government offered portions of Donnie's grand jury testimony into evidence. The defendants objected, arguing that such testimony was inadmissible hearsay. The district court first determined that Donnie was an unavailable witness due to his continuing refusal to testify despite court orders to do so. Fed. R. Evid. 804(a)(2). The district court then determined that although Donnie's grand jury testimony was not admissible under the former testimony exception to the hearsay rule, because it was not subject to cross examination, Federal Rule of

Evidence 804(b)(1); United States v. Salerno, 505 U.S. 317, 321-22 (1992), it was admissible under the residual hearsay exception, Federal Rule of Evidence 804(b)(5). The district court later determined that the admission of the grand jury testimony was error. We find, however, that Donnie's testimony was admissible under Rule 804(b)(5).

Rule 804(b)(5), considered the residual or "catch-all" exception to the hearsay rule, provides in relevant part:

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, [is admissible] if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

Fed. R. Evid. 804(b)(5) (emphasis added). The district court held that Donnie's grand jury testimony, as former testimony, was "specifically covered" by another exception to the hearsay rule, namely section 804(b)(1) and was, therefore, inadmissible under the catch-all exception. United States v. Earles, No. CR 91-4016-DEO, order at 11 (N.D. Ia., Dec. 29, 1995) (citing United States v. Vigoa, 656 F. Supp. 1499, 1504 (D.N.J. 1987), aff'd without opinion, 857 F.2d 1467 (3d Cir. 1988)). In so holding, the district court committed reversible error.

The meaning of the catch-all's "specifically covered" language has caused considerable debate. See, e.g.,

McKethan v. United States, 439 U.S. 936 (1978) (Justices Stewart and Marshall dissenting from the Court's denial of writs of certiorari and contending that the Court should resolve the circuit split on this issue). However, the majority of circuit courts have held that the phrase "specifically covered" means only that if a statement is admissible under one of the prior exceptions, such prior subsection should be relied upon instead of subsection (b)(5). If, on the other hand, the statement is inadmissible under the other exceptions, these courts allow the testimony to be considered for admission under Rule 804(b)(5). United States v. Marchini, 797 F.2d 759, 763 (9th Cir. 1986) (compiling cases); see United States v. Deeb, 13 F.3d 1532, 1536-37 (11th Cir. 1994); United States v. Clarke, 2 F.3d 81, 84 (4th Cir. 1993); United States v. Guinan, 836 F.2d 350, 354 (7th Cir. 1988).

This court has previously validated the use of grand jury testimony under Rule 804(b)(5), although without discussing the meaning of the rule's "specifically covered" language. United States v. Carlson, 547 F.2d 1346, 1355 (8th Cir. 1976). In that case, we affirmed the district court's use of Rule 804(b)(5) to admit a declarant's prior grand jury testimony. Id. Here, in declining to follow Carlson, the district court stated that "the law surrounding this issue has been more fully developed since 1976" and that it was thus not "inappropriate" to distinguish the Carlson case.[2] United States v. Earles, order at 15. To

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2. The district court also found that the Supreme Court's decision in United States v. Salerno compelled this result. Salerno, 505 U.S. at 317. We disagree. The Salerno case contains no references to Rule 804(b)(5). It deals solely with the propriety

the contrary, we reaffirm our holding in Carlson and hold that if a statement is inadmissible under a prior hearsay exception, the statement may nonetheless be considered for admission under the catch-all exception.[3]

To be admissible under the catch-all exception, the proffered statement must have circumstantial guarantees of trustworthiness. "In assessing the qualitative degree of trustworthiness of a particular statement, courts should

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of admitting grand jury testimony under Rule 804(b)(1), as former testimony. Id. at 321. Therefore, we do not believe that Salerno addressed the question presented in this case, much less compelled the result reached by the district court.

[3] We think that "specifically covered" means exactly what it says: if a statement does not meet the requirements for admission under a prior exception, then it is not "specifically covered" by that exception and can be considered for admission under the catch-all. We agree with the reasoning of the Eleventh Circuit:

> "If a statement does not satisfy all of the requirements of Rule 804(b)(1), then it is not a statement 'covered by [one] of the foregoing exceptions' within the meaning of Rule 804(b)(5). We consider admissible those statements that are similar though not identical to hearsay clearly falling under one of the four codified exceptions, if the statements otherwise bear indicia of trustworthiness equivalent to those exceptions. The contrary reading would create an arbitrary distinction between hearsay statements that narrowly, but conclusively, fail to satisfy one of the formal exceptions, and those hearsay statements which do not even arguably fit into a recognized mold."

Deeb, 13 F.3d at 1536-37 (quoting United States v. Fernandez, 892 F.2d 976, 981 (11th Cir. 1990)).

inquire into the reliability of and necessity for the statement." Carlson, 547 F.2d at 1354. Donnie testified under oath and under penalty of perjury at the grand jury proceeding. He related facts of which he had personal knowledge, so the "possibility of faulty recollection was minimized." Id. Except to admit that he knew more than earlier stated, Donnie never recanted his testimony nor did any extrinsic evidence cast doubt on the accuracy of that testimony. In addition to its reliability, there was a substantial need for the testimony because Donnie was unavailable to testify at trial and there were no other persons, to the government's knowledge, who could testify about the events in question. Id. These facts adequately fulfill the catch-all's requirement that the statement bear circumstantial guarantees of trustworthiness.[4]

The other requirements of Rule 804(b)(5) are also satisfied in this case. As previously noted, Donnie was an unavailable witness. Fed. R. Evid. 804(a)(2). Donnie's testimony was evidence of a material fact in that it directly implicated Earles and Papajohn and showed their intent and plan. The facts were more probative than any other available evidence and there has been no indication that

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[4] Furthermore, we note the similarities between Rule 804(b)(5)'s requirement of circumstantial guarantees of trustworthiness and the Confrontation Clause's requirement that a statement bear adequate indicia of reliability, discussed infra at 9. See Idaho v. Wright, 497 U.S. 805, 814 (1990); United States v. Woolbright, 831 F.2d 1390, 1397 (8th Cir. 1987). Donnie's statements meet Rule 804(b)(5)'s trustworthiness requirement for the additional reasons discussed in our Confrontation Clause analysis.

the prosecution could obtain the proof elsewhere. Furthermore, the interests of justice were served by the admission of this evidence. The government granted Donnie immunity in an attempt to secure his trial testimony, and only relied on the grand jury testimony after Donnie's continuing refusals to testify at trial. Also, because of the circumstantial guarantees of trustworthiness surrounding the testimony and its overall probative value, the admission of this evidence increased the likelihood that the jury would ascertain the truth about the cause of the fire. See Huff v. White Motor Corp., 609 F.2d 286, 295 (7th Cir. 1979). Finally, defendants Earles and Papajohn had notice of the prosecution's intent to use Donnie's grand jury testimony against them if Donnie refused to testify at trial. Therefore, we find that the grand jury testimony in this case is admissible under the catch all-exception.

This does not end our inquiry, however, because incriminating statements that are admissible under an exception to the hearsay rule are nonetheless inadmissible under the Confrontation Clause unless the prosecution either produces the declarant for cross-examination or demonstrates both that the declarant is unavailable and that the statement bears adequate indicia of reliability. Idaho v. Wright, 497 U.S. 805, 814 (1990). As the Supreme Court has stated, "[W]hen a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate 'indicia of reliability.' " Ohio v. Roberts, 448 U.S. 56, 66 (1980). This reliability requirement can be met where a statement either falls within a firmly rooted

hearsay exception or is supported by a showing of particularized guarantees of trustworthiness. Id.

Once again, we note that Donnie was clearly unavailable as a witness under Rule 804(a)(2). Next, assuming that no firmly rooted hearsay exception applies here, we must consider whether Donnie's testimony had particularized guarantees of trustworthiness. Such guarantees of trustworthiness must "be drawn from the totality of circumstances that surround the making of the statement and that render the declarant particularly worthy of belief." Wright, 497 U.S. at 820. However, evidence corroborating the truth of a hearsay statement is not relevant to a finding of trustworthiness. Id. at 822. Under these stringent requirements, we, nonetheless, find that Donnie's grand jury testimony was supported by guarantees of trustworthiness sufficient to warrant its admission without an opportunity for confrontation.

We note that Donnie's testimony was given under oath. Carlson, 547 F.2d at 1354. Although Donnie was at first reluctant to implicate his father, he eventually chose to explain the events surrounding the store burning, stating that he was only offering the testimony because it was the right thing to do. Furthermore, Donnie never recanted his inculpatory testimony or expressed belated views as to its accuracy. Id. Although he later refused to further implicate his father or Papajohn, Donnie never denied the truth of his earlier statements. Also, we think it unlikely that Donnie would implicate his father and Papajohn in a serious crime unless the story were true. See, e.g., United States v. Roberts, 844 F.2d 537, 546 (8th Cir. 1988) (stating it was unlikely that family member would testify falsely against another family member).

Donnie's willingness to sit in jail instead of testifying against his father and Papajohn lends further credence to this factor. Id. If Donnie's testimony would have exonerated his father, he would presumably have testified to that effect.

B. Judgment of Acquittal

We turn to the district court's grant of judgment of acquittal for the defendants. A motion for judgment of acquittal should only be granted "where the evidence, viewed in the light most favorable to the government, is such that a reasonably minded jury must have a reasonable doubt as to the existence of any of the essential elements of the crime charged." United States v. Mundt, 846 F.2d 1157, 1158 (8th Cir. 1988). See also United States v. Robbins, 21 F.3d 297, 299 (8th Cir. 1994); United States v. Pardue, 983 F.2d 843, 847 (8th Cir. 1993). This standard allows the district court very limited latitude; it can neither weigh the evidence nor assess the credibility of witnesses. Pardue, 983 F.2d 847 (citing Burks v. United States, 437 U.S. 1, 16 (1978)). The test is the same for this court as for the district court.

A brief review of the evidence presented at trial shows that there was more than sufficient evidence to sustain the guilty verdicts. The government introduced evidence that Papajohn's grocery store had not been doing well and that she was behind in her payments on the store. There was further evidence that both Papajohn and Earles found the store to be a burden, desired to be rid of it, and had unsuccessfully tried to sell it. Donnie's testimony showed that Earles had planned to burn the

store, a prior attempt had failed, and that the night Earles burned the store, he had barely been able to get out of the store safely because the lighter fluid burned so quickly. Furthermore, the fire investigators determined the cause of the fire was arson and Earles and Papajohn were easily tied to that arson. Additionally, there was ample evidence of Papajohn's use of the mails to process and collect money for the insurance claim. Based on all of the evidence presented at trial, we conclude that more than sufficient evidence was presented to sustain the guilty verdicts. Therefore, the district court erred in granting defendants' motions for judgment of acquittal.

In light of our holding that Donnie's grand jury testimony was properly admitted, however, the district court correctly denied defendants' motions for a new trial on that ground. We have considered the remainder of defendants' arguments and motions and find them to be without merit.

III. CONCLUSION

Because the district court erred in ruling the grand jury testimony should have been excluded and in issuing a judgment of acquittal for defendants, we reverse. We remand this case to the district court for the reinstatement of the jury's verdict.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 96-1246NISC

United States of America, Appellant, vs. Donald Lee Earles, Appellee,	*	Order Denying Petitions for Rehearing and Suggestion for Rehearing En Banc
United States of America, Appellant, vs. Catherine Papajohn, Appellees.	*	

The suggestions for rehearing en banc are denied. The petitions for rehearing by the panel are also denied.

June 18, 1997

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

Supreme Court, U.S.
FILED
DEC 16 1997
CLERK

No. 97-505

In the Supreme Court of the United States

OCTOBER TERM, 1997

DONALD LEE EARLES AND CATHERINE PAPAJOHN,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether an out-of-court statement is categorically barred from admission at trial under the "residual" exception to the hearsay rule, Fed. R. Evid. 804(b)(5), if it nearly satisfies, but does not quite satisfy, the requirements of another exception to that rule.

2. Whether the particular grand jury testimony of a prosecution witness who refused to testify at petitioners' trial had sufficient indicia of reliability to justify the admission of that testimony under Rule 804(b)(5) and the Confrontation Clause of the Sixth Amendment.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	13
Conclusion	24

TABLE OF AUTHORITIES

Cases:

Idaho v. *Wright*, 497 U.S. 805 (1990)	10, 15, 19
Lockhart v. *Nelson*, 488 U.S. 33 (1988)	24
United States v. *Bailey*, 581 F.2d 341 (3d Cir. 1978)	17
United States v. *Barlow*, 693 F.2d 954 (6th Cir. 1982), cert. denied, 461 U.S. 945 (1983)	16
United States v. *Boulahanis*, 677 F.2d 586 (7th Cir.), cert. denied, 459 U.S. 1016 (1982)	16
United States v. *Carlson*, 547 F.2d 1346 (8th Cir. 1976), cert. denied, 431 U.S. 914 (1977)	16
United States v. *Clarke*, 2 F.3d 81 (4th Cir. 1993), cert. denied, 510 U.S. 1166 (1994)	16
United States v. *Dent*, 984 F.2d 1453 (7th Cir.), cert. denied, 510 U.S. 858, 875 (1993)	17
United States v. *Donlon*, 909 F.2d 650 (1st Cir. 1990)	15
United States v. *Earles*:	
955 F.2d 1175 (8th Cir. 1992)	4
No. CR 91-4016-MWB, 1997 WL 688737 (N.D. Iowa Nov. 4, 1997)	11, 12, 23
United States v. *Fernandez*, 892 F.2d 976 (11th Cir.), cert. dismissed, 495 U.S. 944 (1990)	16, 17, 19
United States v. *Flores*, 985 F.2d 770 (5th Cir. 1993)	19-20

Cases—Continued: Page

United States v. *Furst*, 886 F.2d 558 (3d Cir. 1989), cert. denied, 493 U.S. 1062 (1990) 16, 17
United States v. *Gomez-Lemos*, 939 F.2d 326 (6th Cir. 1991) 19
United States v. *Gonzalez*, 559 F.2d 1271 (5th Cir. 1977) 16
United States v. *Hitsman*, 604 F.2d 443 (5th Cir. 1979) 16
United States v. *Ismoila*, 100 F.3d 380 (5th Cir. 1996), cert. denied, 117 S. Ct. 1712 (1997) 16
United States v. *Lang*, 904 F.2d 618 (11th Cir.), cert. denied, 498 U.S. 924 (1990) 21
United States v. *Salerno*, 505 U.S. 317 (1992) 17, 18
United States v. *Snyder*, 872 F.2d 1351 (7th Cir. 1989) 16, 19
United States v. *Vigoa*, 656 F. Supp. 1499 (D.N.J. 1987), aff'd, 857 F.2d 1467 (3d Cir. 1988) 17

Constitution, statutes and rules:

U.S. Const.:
Amend. V 6, 18
Double Jeopardy Clause 24
Amend. VI (Confrontation Clause) .. 10, 13, 14, 18, 19, 20
18 U.S.C. 371 2
18 U.S.C. 844(i) 2
18 U.S.C. 1341 2
Fed. R. Crim. P. 33 ..... 11, 12, 23
Fed. R. Evid.:
Rule 803(24) 8, 16, 17
Rule 804(b) 14
Rule 804(b)(1) 9, 18, 20
Rule 804(b)(3) 17
Rule 804(b)(5) ..... *passim*
Rule 807 8

Miscellaneous: Page

S. Rep. No. 1277, 93d Cong., 2d Sess. (1974) 15
Robert Stern, Eugene Gressman, Stephen Shapiro & Kenneth Geller, *Supreme Court Practice* (7th ed. 1993) 13

In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-505

DONALD LEE EARLES AND CATHERINE PAPAJOHN,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 25a-37a) is reported at 113 F.3d 796. The opinion of the district court granting petitioners' motion for judgment of acquittal (Pet. App. 1a-24a) is unreported. The district court's opinion of November 4, 1997, denying petitioners' motion for a new trial under Federal Rule of Criminal Procedure 33, is not yet reported in the Federal Supplement, but may be found at 1997 WL 688737.

JURISDICTION

The judgment of the court of appeals was entered on May 8, 1997. A petition for rehearing was denied on June 18, 1997. Pet. App. 38a. The petition for a writ of certiorari was filed on September 16, 1997. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Iowa, petitioners were found guilty of arson, in violation of 18 U.S.C. 844(i) (Count 1); mail fraud (or, in the case of petitioner Earles, aiding and abetting mail fraud), in violation of 18 U.S.C. 1341 (Counts 2 and 3); and conspiracy to commit those offenses, in violation of 18 U.S.C. 371 (Count 5). Pet. App. 2a, 4a-5a. The district court thereafter granted petitioners' post-trial motions for judgment of acquittal on the ground that certain grand jury testimony had been improperly admitted at trial, and that without that testimony the evidence was insufficient to convict them. The court of appeals reversed, and remanded with instructions to reinstate the jury's verdict. Petitioners have not yet been sentenced.

1. Petitioner Papajohn owned and operated the Countryside IGA, a grocery store in Sloan, Iowa. Petitioner Earles, who lived with Papajohn as her common-law husband, operated Cade, Inc., a business that reconditioned car parts and sold cars. That business was operated out of the Cade Building, which was owned by Papajohn; Earles had given her the money to buy the building to protect the asset from Earles' ex-wife, who had a judgment against him. Earles occasionally worked at the IGA. Earles' adult son, Donald Scott Earles (Donnie Earles or Donnie), resided in the Sloan area. Gov't C.A. Br. 3, 27-29.

In late 1988 and early 1989, the IGA was in serious financial trouble. Papajohn was falling behind in her payments to creditors and vendors, and she was six

months in arrears in her payments on a secured note for the IGA inventory at the Sloan State Bank. Moreover, her checking account was often overdrawn, and her business owner's insurance premium was almost due. In late 1988, Papajohn tried but failed to find a buyer for the IGA. Gov't C.A. Br. 3, 29-31.

At approximately 1:00 a.m. on January 23, 1989, Deputy Gary Edwards saw Donnie Earles enter the Cade Building, followed shortly thereafter by his father, who had just left the IGA. A blue pickup truck registered to Cade, Inc., was parked in front of the IGA. A short time later, Deputy Edwards saw the two men leave the Cade Building in the blue pickup. Petitioner Earles and Donnie drove to Papajohn's residence, which they entered through the back door. Gov't C.A. Br. 4, 31-32.

At about 3:55 a.m., the authorities received notice that the IGA was on fire. The fire chief arrived at the scene soon afterwards. Flames were coming through the back door and window. The fire chief entered through the back door, which was slightly ajar, and found a set of oxygen acetylene tanks just inside the doorway. Their valves were burned off, and the handles were cut through. A sheriff's deputy also present at the fire scene spoke with petitioners, who were sitting in a truck nearby. Petitioners were both calm. They gave the deputy separate addresses, even though they lived together. Gov't C.A. Br. 4, 32-33.

After the fire had been put out, empty cans of charcoal lighter fluid were found in various places in the basement and on the first floor near the elevator shaft; debris from the fire contained petroleum distillate, a material commonly available as charcoal lighter fluid. Gov't C.A. Br. 33-36. On January 17, 1989—one week before the fire—Papajohn had ordered

four cases of lighter fluid, an order that she had received before the night of the fire. *Id.* at 31. Moreover, one or two days before the fire, petitioner Earles and Donnie had brought the acetylene torches into that back room and had placed them close to the electrical panel; the worst damage from the fire occurred where the acetylene torches were found. *Id.* at 39. Further, petitioner Earles told the insurance investigator that, on the evening of the fire, he had entered and exited the store by way of the front door because the back door had been barred. An investigation showed, however, that the bar used to block the back door was not in place at the time of the fire. *Id.* at 35, 40. A fire marshal, an insurance investigator, and an electrical engineer inspected the fire scene and determined that the fire was incendiary, that it had multiple points of origin, and that a flammable liquid had been used as an accelerant. *Id.* at 4, 33-37.

Papajohn presented a claim for damages caused by the fire to St. Paul Fire and Marine Insurance Company. Because, at the time of payment, the insurance company was not aware of any "direct involvement" by Papajohn in the setting of the fire, see Gov't C.A. Reply Br. 1, it mailed her six checks totalling $188,665 in settlement of her claim, Gov't C.A. Br. 4-5.

2. Before petitioners were indicted, Donnie Earles testified twice before a grand jury under a grant of use immunity.[1] On May 15, 1991, during his first

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[1] Petitioners and Donnie had previously been the subject of an investigation into a mail fraud scheme involving the sale of non-existent goods to farmers. *United States* v. *Earles*, 955 F.2d 1175 (8th Cir. 1992). Trial of that matter resulted in petitioner Earles' conviction and Papajohn's acquittal. Pursuant to an agreement with the government, Donnie pleaded guilty to

appearance, Donnie told the grand jury that he did not know who had burned down the IGA but that he would not put it past his father and Papajohn to do such a thing. At his second appearance on July 17, 1991, Donnie told the grand jury that he knew much more than he had earlier disclosed about the fire. He testified that, on the day of that fire, his father had told him that he planned to burn the IGA, that he had unsuccessfully attempted to do so the night before, and that he would try again that night. Petitioner Earles had explained to Donnie that he and Papajohn wanted to be rid of the IGA and needed the insurance money to pay off their debts and start over again. In preparation for the fire, Donnie recounted, petitioner Earles had put boxes under the stairway, stockpiled cases of lighter fluid under and above the elevator, sprayed the store with lighter fluid, and started the fire. Petitioner Earles had also confided in Donnie that he had barely been able to get out of the store because the lighter fluid had ignited so quickly. Donnie testified that he had wanted to recount those facts during his first grand jury appearance, but that he had not wanted to betray his father. Pet. App. 26a; Gov't C.A. Br. 5-6, 10-11.

Petitioners were indicted in October 1991. In early March 1994, while pretrial motions were pending, Donnie informed the government, through his attorney, that he would not testify at his father's trial. Concerned that Donnie had been pressured, the government brought Donnie before the grand jury

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conspiracy to commit mail fraud in return for his cooperation in several matters under investigation, including the burning of the IGA. Donnie appeared before the grand jury pursuant to that plea agreement.

for a third time on April 5, 1994. Donnie told the grand jury that he was not going to testify against petitioners. He explained that his decision was not based on his Fifth Amendment right against self-incrimination, but that "[s]omething inside of [him]" prevented him from testifying against his father. 4/5/94 Tr. 20; see also *id.* at 11, 14. Similarly, he stated that he could not testify against Papajohn because she was "involved" with his father. *Id.* at 16; see also Pet. App. 26a-27a; Gov't C.A. Br. 5-6, 11-12.

3. The district court held a pretrial hearing concerning the circumstances underlying Donnie's grand jury testimony. Testimony at that hearing showed that, following Donnie's first grand jury appearance, agents talked to him further about his knowledge of the fire. Donnie denied any involvement and agreed to take a polygraph test. During the trip to Omaha, where the polygraph examination occurred, Donnie, who was nervous, told government agent Dan Fridley that he had some information that he had not shared before. He stated that his father had told him that he started the fire in order to collect the insurance proceeds. He added that, a few days after the fire, his father had told him that stockpiling the charcoal lighter fluid had paid off and that he had barely escaped from the blaze alive. Donnie further told Agent Fridley that, before the fire, he had heard a conversation between his father and Papajohn about burning the building to collect enough insurance money to help them pay off their considerable debts. In Omaha, just before taking the polygraph test, Donnie repeated that account and provided additional details. Gov't C.A. Br. 17-19; 5/13/94 (a.m.) Tr. 6-9, 25-26, 30, 41-42, 92-93.

After the polygraph test was complete, the polygraph examiner stated that Donnie's responses to some of his questions indicated deception. The examiner believed that he was telling the truth about his father's involvement in the fire, but that he was holding back something else. The examiner speculated that Donnie himself might have been involved in the preparation of the fire or that he might have been present at the scene. Gov't C.A. Br. 20-21; 5/13/94 (a.m.) Tr. 12-14; 6/23/94 Tr. 62, 69-70, 83.

4. At trial, Donnie refused to testify despite a grant of use immunity, was found in contempt of court, and was sent to jail.[2] The court declared Donnie an unavailable witness (see Pet. App. 7a & n.3) and allowed the government to read portions from all three of the transcripts of Donnie's grand jury testimony. In admitting that testimony, the court relied on Rule 804(b)(5) of the Federal Rules of Evidence, the "residual" hearsay exception governing the admissibility of out-of-court statements made by witnesses who are unavailable to testify at trial. *Id.* at 28a-30a. Rule 804(b)(5) provides that "[a] statement not specifically covered by any of the foregoing

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[2] Petitioners' trial had originally been severed, and Papajohn had proceeded to trial first. At that trial, Donnie refused to testify, asserting his privilege against self-incrimination (even though he had been granted immunity, see Pet. App. 2a) and insisting as well that he would not testify against Papajohn because "[s]he is family also." 3/23/95 Tr. 31. The district court held Donnie in contempt and jailed him for his failure to testify. After ordering a continuance, the district court granted a mistrial based on Papajohn's agreement to be tried together with Earles. Pet. App. 27a-28a. When Donnie refused to testify at the joint trial, the district judge kept Donnie in jail under the previous contempt order. See *id.* at 3a-4a. In total, Donnie served 140 days in jail for contempt. See *id.* at 4a n.2.

exceptions but having equivalent circumstantial guarantees of trustworthiness" is admissible "if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence."[3]

Following their convictions, petitioners moved for judgment of acquittal or, in the alternative, for a new trial. They claimed that the district court had erred in admitting Donnie's grand jury testimony and that the government's evidence, without that testimony, was insufficient to support the convictions. The district court reversed its earlier evidentiary ruling and agreed with petitioners. The court found that it had erred in admitting the testimony under Rule 804(b)(5) because, in its view, "grand jury testimony, if admitted, must be admitted pursuant to the requirements of [Fed. R. Evid.] 804(b)(1)," Pet. App. 11a, which excludes from the hearsay rule a witness's former testimony when the party against whom the testimony is now offered had an opportunity and similar motive to cross-examine the witness at the time of the testimony. The court determined

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[3] Effective December 1, 1997, Rule 804(b)(5) was transferred to a new Rule 807 of the Federal Rules of Evidence and consolidated with former Rule 803(24), the residual exception for available declarants. The change was nonsubstantive and does not affect the issues presented in this case. For ease of exposition, we will refer to the residual hearsay exception in question as Rule 804(b)(5), which was the provision applicable at the time of trial and appeal.

that the evidence was inadmissible under the latter provision because petitioners had lacked an opportunity to cross-examine Donnie before the grand jury. *Id.* at 7a. The court then concluded that, apart from Donnie's testimony, the evidence against petitioners was insufficient to support the verdicts, and it entered a judgment of acquittal. *Id.* at 18a-19a. The government appealed. *Id.* at 29a.

5. The court of appeals reversed. Pet. App. 25a-37a. The court first held that Donnie's grand jury testimony was properly admitted under Rule 804(b)(5), and it rejected petitioners' claim that prior testimony that does not meet the requirements of Rule 804(b)(1) is for that reason categorically inadmissible under the residual exception. *Id.* at 30a-32a. In particular, the court held that the residual provision's "specifically covered" language "means only that if a statement is admissible under one of the prior exceptions, such prior subsection should be relied upon instead of subsection (b)(5)." *Id.* at 31a. The court concluded: "[I]f a statement is inadmissible under a prior hearsay exception, the statement may nonetheless be considered for admission under the catch-all exception." *Id.* at 32a.

The court found that Donnie's testimony had sufficient circumstantial "guarantees of trustworthiness" to support its admission under Rule 804(b)(5). First, the court explained, Donnie had given that testimony under oath and under penalty of perjury, and he had testified about facts within his personal knowledge. Pet. App. 33a. Moreover, "[e]xcept to admit [during his second grand jury appearance] that he knew more than earlier stated, Donnie never recanted his testimony nor did any extrinsic evidence cast doubt on the accuracy of that testimony." *Ibid.*

The court also found that Donnie was in fact "unavailable" because he had refused to testify at trial despite the government's offer of immunity, and that his grand jury testimony was therefore "more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts" (Fed. R. Evid. 804(b)(5)). See Pet. App. 33a-34a.

The court of appeals followed a similar analysis in rejecting petitioners' challenge under the Confrontation Clause of the Sixth Amendment. It first noted that, under this Court's precedent, Donnie's grand jury testimony was admissible if and only if it "had particularized guarantees of trustworthiness," which "must 'be drawn from the totality of circumstances that surround the making of the statement and that render the declarant particularly worthy of belief.'" Pet. App. 35a (quoting *Idaho* v. *Wright*, 497 U.S. 805, 820 (1990)). The court found that this testimony met those "stringent requirements." *Ibid.* The court again noted that "Donnie's testimony was given under oath" and that he "never recanted his inculpatory testimony or expressed belated views as to its accuracy." *Ibid.* The court added that it is "unlikely that Donnie would implicate his father and Papajohn in a serious crime unless the story were true." *Ibid.* Finally, the court held that "Donnie's willingness to sit in jail instead of testifying against his father and Papajohn lends further credence to this factor" because, "[i]f Donnie's testimony would have exonerated his father, he would presumably have testified to that effect." *Id.* at 36a.

Finally, the court found "more than sufficient evidence" to sustain the guilty verdicts against petitioners. Pet. App. 36a. Papajohn's grocery store had

not been doing well and she was behind on her payments. Both petitioners found the store to be a burden, wanted to be rid of it, and had unsuccessfully tried to sell it. *Ibid.* Donnie's grand jury testimony established that Earles had made a prior attempt to burn the store, and that he had been responsible for setting the fire on the night in question, almost losing his life in the process. *Id.* at 36a-37a.

6. In June 1997, petitioners filed motions in the district court for a new trial under Federal Rule of Criminal Procedure 33 based on what they characterized as "newly discovered evidence." The "evidence" in question derives from a telephone "deposition" of Donnie Earles conducted on May 15, 1997, shortly after the court of appeals issued its decision. In that "deposition"—of which the government was given no notice and at which Papajohn's attorney asked prepared questions of Donnie and petitioner Earles' attorney conducted "cross-examination"—Donnie recanted the incriminating portions of his grand jury testimony against petitioners. See *United States* v. *Earles*, No. CR 91-4016-MWB, 1997 WL 688737, at *2 (N.D. Iowa Nov. 4, 1997).

On November 4, 1997, after conducting an evidentiary hearing, the district court denied the motions for new trial on several alternative grounds. 1997 WL 688737, at *7-*22.[4] The court first held that, "[b]ecause Donnie refused at the time of trial to provide the testimony he now proffers, even though he was a witness known to [petitioners] and he was given the opportunity to present this testimony, * * * his recantation of his grand jury testimony is not 'newly

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[4] We have lodged a copy of the district court's opinion with this Court.

discovered evidence' within the meaning of Rule 33." *Id.* at *17. Moreover, the court added, Donnie's new disclaimer of knowledge of the events in question "was actually presented in the trial, because both the May 15, 1991, and July 17, 1991, versions of [his] grand jury testimony were admitted," and, as a result, "the jury has heard this evidence before; that being so, the latest recantation cannot be considered 'newly discovered evidence' upon which to base a new trial." *Ibid.*

The court then held that, even if Donnie's post-appeal "recantation" could be considered "newly discovered evidence" under Rule 33, "it is highly unlikely that a jury at a second trial would believe his latest recantation of testimony." *Id.* at *18. The court noted that "his grand jury testimony was not recanted until the [court of appeals] held that it was properly admitted at trial. In other words, Donnie had obvious reasons to fabricate his latest recantation at the time it was finally offered." *Id.* at *19; see also *id.* at *20-*21 (noting that Donnie's latest testimony is "nebulous, at worst almost incoherent," and "simply is not credible"). The court concluded that Donnie's post-appeal recantation "is neither credible to the court, nor likely to be credible to a jury, nor likely to produce an acquittal on a retrial." *Id.* at *22.

On November 14, 1997, petitioners filed a notice of appeal from the district court's denial of their Rule 33 motion. That appeal is currently pending in the Eighth Circuit.

ARGUMENT

Petitioners claim that the admission at trial of Donnie Earles' grand jury testimony violated the Federal Rules of Evidence and the Confrontation Clause. That claim does not merit this Court's review.

1. As an initial matter, the petition should be denied because, given the unusual procedural posture of this case, this Court's review would be premature. The court of appeals' decision is interlocutory in that petitioners have not yet been sentenced and no judgment of conviction has been entered against them. In criminal cases, this Court follows a general practice of denying the defendant's request for review of interlocutory decisions, preferring instead to review any issues adjudicated in such decisions after a final judgment has been entered. See Robert Stern, Eugene Gressman, Stephen Shapiro & Kenneth Geller, *Supreme Court Practice* § 4.18, at 196 & n.60 (7th ed. 1993). The prudential reasons for following that course are particularly compelling in this case. Although petitioners have not alerted this Court to any of the recent proceedings in the district court, they moved in June 1997 for a new trial on the ground that, *after* the court of appeals rendered its decision in this case, Donnie Earles "recanted" his grand jury testimony against them. As discussed above, the district court found those motions to be without merit and denied them. Petitioners' appeal of that denial is now pending in the court of appeals.

The subject of petitioners' motions for a new trial —the veracity of Donnie's grand jury testimony—is inextricably related to the issues presented in their petition in this Court. The "evidence" at issue in

those motions, however, is not part of the record on which the court of appeals rendered its decision. Yet this Court could not, as a practical matter, review the issues presented in this case without considering the relevance of those matters—thus confronting issues that the court of appeals has not yet addressed and that are not properly before this Court. That procedural obstacle makes this case an unsuitable vehicle for addressing the legal issues on which petitioners seek review, and the petition should be denied for that reason alone. Nonetheless, because this Court has called for the government's response to the arguments presented in that petition, we address those arguments on the merits.

2. Petitioners present two principal arguments. First, they contend that an out-of-court statement is categorically barred from admission at trial under Federal Rule of Evidence 804(b)(5) if it nearly qualifies, but does not quite qualify, for admission under another exception to the hearsay rule. In the alternative, petitioners argue that, on the particular facts of this case, Donnie's grand jury testimony lacked sufficient indicia of reliability to justify its admission under either Rule 804(b)(5) or the Confrontation Clause of the Sixth Amendment. Neither of those arguments has merit, and, even apart from the procedural difficulties discussed above, neither warrants further review.

a. Rule 804(b)(5) authorizes the admission of the hearsay statement of an unavailable witness when the statement is "not specifically covered" by another Rule 804(b) exception, but has "equivalent circumstantial guarantees of trustworthiness." Fed. R. Evid. 804(b)(5). The residual exception constitutes a generally applicable basis for the admission of an out-

of-court statement of an unavailable witness when the trial court finds, on a case-by-case basis, that the statement is sufficiently reliable and meets the other requirements of the rule. See *Idaho* v. *Wright*, 497 U.S. 805 (1990). Nothing in the text of the Rule suggests that the residual exception is unavailable where another exception might apply to "similar" out-of-court statements but is not satisfied on the facts of a particular case.[5]

For that reason, and despite petitioners' suggestion to the contrary, every court of appeals that has ruled on the issue since the adoption of the Federal Rules of Evidence has concluded that an out-of-court statement can be a candidate for admission under Rule 804(b)(5) even if it nearly qualifies, but does not quite qualify, for admission under an express exception. As the First Circuit has explained, there is no basis for concluding that "the 'potential' availability of one kind of hearsay exception automatically rules out the use of another. After all, normally, hearsay testimony is admissible if it satisfies any one exception." *United States* v. *Donlon*, 909 F.2d 650, 654 (1st Cir. 1990) (upholding admission of

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[5] The legislative history supports the view that former testimony may be admitted under the residual exception in particular cases. The Senate Committee on the Judiciary justified its inclusion of a residual hearsay exception in part on the basis that, "without a separate residual provision, the specifically enumerated exceptions could become tortured beyond any reasonable circumstances which they were intended to include." S. Rep. No. 1277, 93d Cong., 2d Sess. 19 (1974). The residual exception could not function as such a safety valve if courts were precluded from admitting a statement under a residual exception whenever the statement was arguably covered by another exception but failed to satisfy its requirements.

grand jury testimony pursuant to Rule 804(b)(5)); see also *United States* v. *Clarke*, 2 F.3d 81, 84 (4th Cir. 1993), cert. denied, 510 U.S. 1166 (1994); *United States* v. *Fernandez*, 892 F.2d 976, 981 (11th Cir.), cert. dismissed, 495 U.S. 944 (1990); *United States* v. *Furst*, 886 F.2d 558, 573 (3d Cir. 1989) (addressing parallel residual exception under Rule 803(24)), cert. denied, 493 U.S. 1062 (1990); *United States* v. *Snyder*, 872 F.2d 1351, 1354-1355 (7th Cir. 1989) (upholding admission of grand jury testimony under residual exception); *United States* v. *Barlow*, 693 F.2d 954, 961-963 (6th Cir. 1982) (same), cert. denied, 461 U.S. 945 (1983); *United States* v. *Boulahanis*, 677 F.2d 586, 588-589 (7th Cir.) (same), cert. denied, 459 U.S. 1016 (1982); *United States* v. *Carlson*, 547 F.2d 1346, 1353-1355 (8th Cir. 1976) (same), cert. denied, 431 U.S. 914 (1977); cf. *United States* v. *Ismoila*, 100 F.3d 380, 393 (5th Cir. 1996) (statements that failed to satisfy requirements of business record exception were admissible under residual exception), cert. denied, 117 S. Ct. 1712, 1858 (1997); *United States* v. *Hitsman*, 604 F.2d 443, 447 (5th Cir. 1979) (same); *United States* v. *Gonzalez*, 559 F.2d 1271, 1273 (5th Cir. 1977) (finding that particular grand jury testimony lacked sufficient "guarantees of trustworthiness" to support admission under Rule 804(b)(5) because, among other considerations, fear of "physical harm * * * to [declarant] and his family" had given him "some incentive not to tell the truth"). Petitioners' contrary analysis would create "an arbitrary distinction between hearsay statements that narrowly, but conclusively, fail to satisfy one of the formal exceptions, and those hearsay statements which do not even

arguably fit into a recognized mold." *Fernandez*, 892 F.2d at 981.[6]

Petitioners are also incorrect in suggesting (Pet. 8) that the decision in this case is inconsistent with *United States* v. *Salerno*, 505 U.S. 317 (1992). That case did not involve Rule 804(b)(5). Rather, it

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[6] Apart from their reliance on the district court decision in *United States* v. *Vigoa*, 656 F. Supp. 1499 (D.N.J. 1987), aff'd, 857 F.2d 1467 (3d Cir. 1988) (Table), petitioners cite *United States* v. *Bailey*, 581 F.2d 341 (3d Cir. 1978), as evidence of a supposed circuit conflict on the proper construction of Rule 804(b)(5). Pet. 7. *Bailey*, however, is consistent with the court of appeals' decision in this case. In that case, the district court had ruled that oral statements made by the defendant's accomplice to the FBI before sentencing were not admissible as statements against penal interest pursuant to Federal Rule of Evidence 804(b)(3), but the court nonetheless admitted them pursuant to Rule 804(b)(5)'s residual hearsay exception. The court of appeals reversed on the ground that, on the particular facts of that case, the statements lacked the "guarantees of trustworthiness" required by Rule 804(b)(5). 581 F.2d at 349-351. Nowhere, however, did the court suggest that admission of other, more reliable out-of-court statements under Rule 804(b)(5) would be inappropriate on the ground that the statements nearly missed qualifying for admission under Rule 804(b)(3). Indeed, in *Furst*, 886 F.2d at 573, the Third Circuit confirmed that the parallel residual exception of Federal Rule of Evidence 803(24) "is not limited in availability as to types of evidence not addressed in the other exceptions; Fed.R.Evid. 803(24) is also available when the proponent fails to meet the standards set forth in the other exceptions." Petitioners also rely on Judge Easterbrook's concurring opinion in *United States* v. *Dent*, 984 F.2d 1453, 1465-1467 (7th Cir.), cert. denied, 510 U.S. 858, 875 (1993). As the majority opinion in that case makes clear, however, controlling Seventh Circuit case law permits the admission of grand jury testimony under the residual hearsay exception of Rule 804(b)(5) if the testimony meets that Rule's stringent criteria. See 984 F.2d at 1462.

addressed whether, when a witness asserts his Fifth Amendment privilege at trial, a court may admit the grand jury testimony of that witness against the government pursuant to Federal Rule of Evidence 804(b)(1), whether or not the government had a similar motive to cross-examine the witness when the grand jury testimony was given. Applying the requirement in Rule 804(b)(1) that former testimony may be admitted under that exception only "if the party against whom the testimony is now offered * * * had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination," the Court held that a defendant has "no right to introduce * * * [a grand jury witness's] former testimony under Rule 804(b)(1) without showing a 'similar motive.'" 505 U.S. at 322. The Court remanded for the court of appeals to consider whether the government had such a "similar motive" in that case. *Id.* at 324-325. *Salerno* holds only that, when former testimony is admitted under Rule 804(b)(1), a court may not "ignore" a specific requirement of that provision. *Id.* at 324. It does not hold that the residual exception in Rule 804(b)(5) is inapplicable to former testimony that does not satisfy Rule 804(b)(1).

b. In the alternative, petitioners also contend (Pet. 9-12) that, even if grand jury testimony is sometimes admissible under the residual hearsay exception, the particular grand jury testimony at issue in this case lacked sufficient indicia of reliability to justify its admission under either Rule 804(b)(5) or the Confrontation Clause. That factbound claim warrants no further review.

Both Rule 804(b)(5) and the Confrontation Clause of the Sixth Amendment require an inquiry into the

objective trustworthiness of a hearsay statement before the trial court may admit it. Fed. R. Evid. 804(b)(5); *Idaho* v. *Wright*, *supra*. Where, as here, the hearsay statement does not fall within a recognized hearsay exception, it must have "particularized guarantees of trustworthiness" arising from the circumstances in which the statement was made. *Wright*, 497 U.S. at 819-823. Although this Court held in *Wright* that "corroborating evidence" is not one of the circumstances to be considered, the Court "decline[d] to endorse a mechanical test for determining 'particularized guarantees of trustworthiness' under the [Confrontation] Clause," recognizing that trial courts "have considerable leeway in their consideration of appropriate factors." *Id.* at 822.

The courts that have considered whether the grand jury testimony of an unavailable witness is admissible have properly focused on the particular facts of each case, without applying a "mechanical test." See, *e.g.*, *Snyder*, 872 F.2d at 1356. Here, the court of appeals determined that the circumstantial "guarantees of trustworthiness" underlying Donnie Earles' grand jury testimony satisfied the rigorous demands of both the Confrontation Clause and Rule 804(b)(5).[7] The

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[7] Although some courts of appeals have indicated that the Confrontation Clause permits the introduction of grand jury testimony of unavailable witnesses only in unusual circumstances, none of those courts has categorically foreclosed the admission of such testimony. See *United States* v. *Gomez-Lemos*, 939 F.2d 326, 332 (6th Cir. 1991) (admission may be appropriate in "exceptional" cases); see also *Fernandez*, 892 F.2d at 981-983 (declining to "rally behind appellants' call for a *per se* ban," and noting that "extraordinarily trustworthy" grand jury testimony could be admissible under Rule 804(b)(5)); cf. *United States* v. *Flores*, 985 F.2d 770, 781-783 &

court based that determination on a combination of factors: Donnie's sworn testimony concerned matters about which he had personal knowledge; he "never recanted his inculpatory testimony or expressed belated views as to its accuracy"; the circumstances made it "unlikely that Donnie would implicate his father and Papajohn in a serious crime unless the story were true"; and "Donnie's willingness to sit in jail instead of testifying against his father and Papajohn lends further credence" to his testimony because, "[i]f Donnie's testimony would have exonerated his father, he would presumably have testified to that effect." Pet. App. 35a-36a.

Apart from their erroneous contention (see pp. 8-9, *supra*) that the text of Rule 804(b)(5) categorically prohibits the admission of prior testimony that does not meet the requirements of Rule 804(b)(1), petitioners do not argue that any one of the circumstantial factors upon which the court of appeals relied is irrelevant to the admissibility of out-of-court statements under either the Confrontation Clause or

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n.27 (5th Cir. 1993) (where government has "created its own unavailable declarant" by trying defendants jointly and seeking to introduce grand jury testimony of defendant who invokes right not to testify, and where government therefore "has the means to procure the declarant's trial testimony" by agreeing to separate trials, admission of testimony at joint trial generally violates Confrontation Clause, except perhaps in "extremely unusual case[s]"). Petitioner does not cite those decisions or contend that they conflict with the decision below, and they do not. To the contrary, the court of appeals held only that the unusual circumstances of this case combined to meet the "stringent requirements" (Pet. App. 35a) of the Confrontation Clause.

Rule 804(b)(5),[8] nor do petitioners deny that, in another case, the particular combination of those factors could be enough to warrant admission of the evidence. See Pet. 9-12. Instead, petitioners argue only that various *other* "facts in the record" (Pet. 10) —which, they claim, tend to draw Donnie Earle's credibility into question—should have led the court of appeals to find that, on balance, Donnie's testimony lacked sufficient indicia of reliability to support its admission at trial. In finding that the district court had not erred in admitting that testimony, the court of appeals tacitly rejected the factual allegations in question, either because it deemed them unsupported

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[8] For example, the petition presents no claim that the court of appeals erred in relying on Donnie's familial relationship with his father as one factor supporting the reliability of Donnie's testimony and therefore the admissibility of that testimony under the Confrontation Clause. Cf. *United States* v. *Lang*, 904 F.2d 618, 623-625 (11th Cir.) (stating, *inter alia*, that "[f]amily members are no more likely than anyone else to testify truthfully about their activities or those of their relations"; holding that it was error under Rule 804(b)(5) to admit father's grand jury testimony against son after father had recanted portions of that testimony; and nonetheless affirming conviction because error was harmless), cert. denied, 498 U.S. 924 (1990). Any such claim would have lacked merit on the facts of this case, given Donnie's express invocation of that relationship as the source of his reluctance to incriminate his father. See p. 5, *supra*. Petitioners do argue (Pet. 10) that Donnie "could not stand Papajohn"—his father's common-law wife—and that, as a result, "he had a clear motive to fabricate his testimony." That factbound argument is without merit. Donnie told the grand jury that his *father* played the principal role in setting the fire, and any tension with *Papajohn* would not have induced Donnie to "fabricate" that account of the events. See also 3/23/95 Tr. 31-32 (refusing to testify against Papajohn because "[s]he is family also").

by the record or because it found that they were outweighed by the "guarantees of trustworthiness" underlying Donnie's testimony. See Pet. App. 32a-36a.

Petitioners' challenge to the court's disposition of those allegations is factbound and without merit. For example, petitioners contend (Pet. 11) that Donnie's credibility was compromised by an alleged substance abuse problem. Whether or not Donnie had such a problem, however, the fire marshal who saw him at the scene shortly after the fire testified that he exhibited no signs of insobriety and did not appear to be under the influence of anything. 4/4/95 Tr. 130. Similarly, the government official who escorted Donnie to and from the polygraph examination testified that, when Donnie described his father's involvement in the fire, he was sober and had no difficulty remembering the events in question. See *id.* at 141-142, 145-146, 156-158, 171. There is likewise no merit to petitioners' argument (Pet. 11) that Donnie's grand jury statements were unreliable because he "failed" a polygraph examination. As discussed above (see pp. 6-7), the polygraph examiner believed that Donnie may have been holding something back about his own role in (or presence at) the fire, but that Donnie was telling the truth about his father's involvement.

Finally, petitioners are incorrect in challenging (Pet. 10) the reliability of Donnie's second grand jury testimony on the ground that Donnie was given "perjury immunity * * * so he could change his story with impunity." Donnie was immunized from perjury liability only with respect to his first grand jury appearance, not with respect to his second appearance; under his immunity agreement, if Donnie made any false accusation of petitioners during the

latter appearance, he was exposed to prosecution for perjury. See Gov't C.A. Reply Br. Addendum 4-5.[9] Moreover, despite petitioners' suggestion to the contrary (Pet. 10), there was nothing unreasonable or unusual about the government's refusal to grant Donnie total immunity from any perjury prosecution before he testified at trial. As the district court correctly observed, granting any witness such extraordinary immunity would be contrary to the interests of justice because it "would give him a free ticket to say anything that came into his head without any fear of repercussions." Pet. App. 7a n.3; see also 5/5/95 Tr. 106.[10]

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[9] At petitioners' joint trial (but not at petitioner Papajohn's earlier trial), Donnie claimed for the first time that he had felt "pressured" to testify before the grand jury. See 5/5/95 Tr. 113-114. As the court of appeals correctly determined on the record before it, however, Donnie "never recanted his inculpatory testimony or expressed belated views as to its accuracy," and he "never denied the truth of his earlier statements." Pet. App. 35a. Petitioners' apparent disagreement with that factual determination (see Pet. 10) merits no further review. It is noteworthy that petitioners do not rely on, let alone mention, Donnie's "recantation" of his grand jury testimony, which occurred after the court of appeals had issued its decision in this case but before the filing of this petition. See pp. 11-12, *supra*. Even apart from the district court's recent determination that Donnie's recantation "simply is not credible," 1997 WL 688737, at *21, any consideration of the relevance of that recantation is bound up in procedural issues—currently on appeal in the Eighth Circuit and not properly presented for review in this Court—concerning the proper treatment of allegedly "new" evidence under Federal Rule of Criminal Procedure 33.

[10] Petitioners also argue (Pet. 11-12) that, without Donnie's grand jury testimony, there was insufficient evidence to convict them, and they suggest that they are therefore entitled to

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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the judgment of acquittal that the district court granted them. Even if the district court had erred in admitting that testimony, the appropriate disposition of this case (assuming that the error was not harmless) would be invalidation of the jury's guilty verdicts, followed by a new trial, rather than entry of a judgment of acquittal. See *Lockhart* v. *Nelson*, 488 U.S. 33, 40-42 (1988) (even where some evidence has been erroneously admitted, reviewing court must nonetheless consider all evidence introduced at trial when determining whether evidence was insufficient to support conviction such that Double Jeopardy Clause would bar retrial).